No. (1)

Supreme Court, U.S.
FILED

In The 95 17 JUL 3 - 1995

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1994

STEVEN C. SCHUELLER, M.D.,

Petitioner,

vs.

ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; Estate of DR. C.E. RIPLEY, BETTY RIPLEY, Personal Representative; DR. D.L. TOON and DR. B.J. WALSH,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the lower courts, in a summary judgement proceeding, impose a specific relevant product market standard upon a plaintiff in a § 1 rule of reason case (*i.e.* a product market in surgical referrals), that has been determined by the lower courts without (a) inquiring into commercial realities faced by consumers; or (b) any economic analysis involving products that share reasonable interchangeability of use or cross-elasticity of demand, to the exclusion of another relevant product market that can be found to exist on the basis of commercial realities faced by consumers and evidence of interchangeability of use and cross-elasticity of demand among products, and in the face of evidence of actual injury to competition (reduction in surgical output and increased prices for surgical services) within this product market?

2. Does an affected physician produce evidence sufficient to sustain a jury verdict in his favor that an alleged professional review action was undertaken against him "primarily" upon some basis other than the affected physician's professional competency or conduct, as provided in 42 U.S.C. § 11151(9)(E) when an affected physician establishes that (a) he holds a prima facie § 1 claim against the health care entity and the physicians participating in the action, based upon other activities of the health care entity and the participating physicians, transpiring completely outside the professional review process; (b) the transcript of the hearing reflects that no evidence (testimonial or documentary) was offered against the affected physician and the hearing consisted entirely of a colloquy between the affected physician and the participating physicians; (c) the health care entity's professional review process was employed to retaliate against the affected physician for the affected physician's alleged interference in the private economic relationships among two members of the hearing panel and their prospective business associates; (d) there is evidence that the affected physician was

professionally competent; and (e) there is some evidence that the affected physician and the participating physicians compete across certain lines of business?

3. Must any minimum standard of due process, which is found to be "fair to the physician under the circumstances," within the meaning of 42 U.S.C. § 11112(a)(3), include the rights to receive notice of charges against the affected physician; representation by counsel at any hearing which affects (or may affect) adversely the affected physician's clinical privileges; and the right to confront witnesses at that hearing?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

Steven C. Schueller, M.D.

Respondents:

Ashley Memorial Hospital; Dr. T. Birriel; Dr. F.N. Burt; Dr. E.A. Gresham; Dr. L.F. Garcia; Dr. J.D. Rankin; Estate of Dr. C.E. Ripley, Betty Ripley, personal representative; Dr. D. L. Toon and Dr. B.J. Walsh.

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OPINIONS BELOW

The decision and final judgment of the United States District Court for the Western District of Arkansas, granting respondents' motions for summary judgment is unreported and appears in Appendixes D, 7a and E, 8a-50a. The decision of the Eighth Circuit Court of Appeals, affirming the district court is unreported and appears in Appendixes C, 3a-6a and D, 7a. The Order denying petitioner's petition for rehearing appears in Appendix B, la.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a judgment of the Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254. The decision of the Court of Appeals for the Eighth Circuit was issued January 31, 1995 (App. C, 3a); petitioner sought rehearing, which was denied April 3, 1995 (App. B, 1a).

Petitioner initiated this case in the United States District Court for the Western District of Arkansas pursuant to 28 U.S.C. §§ 1331-1337. A final judgement was entered in Respondents' favor on April 6, 1994. Petitioner filed notice of appeal to the Eighth Circuit Court of Appeals on May 3, 1994. Jurisdiction was in the Court of Appeals for the Eighth Circuit pursuant to that notice of appeal and 28 U.S.C. § 1291.

STATUTES INVOLVED

15 U.S.C. § 1 Trusts, etc. in restraint of trade illegal; penalty

Reproduced in Appendix F at 51a.

42 U.S.C. § 11111. Professional Review

(a) In general.

Reproduced in Appendix F at 52a.

42 U.S.C. § 11112. Standards for professional review actions

(a) In general.

Reproduced in Appendix F at 53a.

42 U.S.C. § 11112. Standards for professional review actions

(b) Adequate notice and hearing.

Reproduced in Appendix F at 54a-57a.

42 U.S.C. § 11151. Definitions

In this title [42 U.S.C. § 11101 *et seq.*]

(b)(9) Reproduced in Appendix F at 51a-52a.

STATEMENT OF THE CASE

A. Procedural History

Petitioner, a board certified general surgeon, sued respondents, six individual doctors and a corporate, non-profit hospital, *inter alia,* for a continuing, uninterrupted conspiracy occurring between 1986 and 1991, the object of which was to boycott petitioner; deny petitioner access to surgical patients in the applicable geographic market; and remove petitioner from

this market, all in violation of Sherman Act §§ 1 and 2. (App. G, 59a; 64a-67a).

Respondents moved for summary judgement, which the district court granted on all petitioner's claims (App. A, 1a). Petitioner appealed his Sherman Act claims to the Eighth Circuit, which affirmed the district court's rulings. (App. B, 2a & C, 3a-6a).

Petitioner seeks this Court's review of the lower court summary judgement holdings that (1) petitioner was required to produce evidence of the existence of a specific, particular relevant "product market," to the extent petitioner's anti-trust claims are based upon respondents' actions outside "professional review," (App. E, 48a-49a & C, 4a-5a); (2) petitioner failed to produce evidence sufficient to establish that an alleged professional review action was undertaken against him primarily upon some basis other than petitioner's professional competency or conduct, as provided in 42 U.S.C. § 11151(9) (App. E, 38a-45a); and (3) petitioner failed to produce evidence sufficient to overcome the presumption that respondents' actions were within the scope of 42 U.S.C. § 11112(a), to the extent petitioner's anti-trust claims were based upon respondents' "professional review" action (*Id.*).

B. Statement of Facts

Respondent hospital is the sole provider of hospital services in the geographic market.[1] (App. E, 47a). Petitioner and all individual respondent doctors pursued separate, individual private medical practices, while simultaneously holding staff

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1. The geographic market encompasses almost all of Ashley County, Arkansas, which had a population of 24,300 in 1992. *Rand McNally 1994 Commercial Atlas & Marketing Guide (125th Ed.).*

privileges at respondent hospital. (App. G, 59a; 61a-62a & 122a). No evidence was introduced indicating that any employment relationship ever existed between respondent hospital and either petitioner or respondent doctors.

Petitioner was a board certified general surgeon who also engaged in the general practice of medicine during this period. (App. G, 148a & 152a). Five of six individual respondent doctors engaged in the general and family practice of medicine; and all respondent primary care physicians denied engaging the practice of surgery, although four of the five also performed low-risk surgical procedures at respondent hospital.[2] (App. G, 84a & 104a-105a). The sixth respondent doctor was a non-board certified general surgeon who joined respondent hospital's staff in 1989. (App. G, 84a).

Petitioner proffered evidence that the demand for surgical services by consumers in this geographic market exceeded 200 cases in 1985, but declined to less than 40 by 1990.[3] No

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2. Two respondent doctors who had a joint medical practice which performed 90% of the caesarean section surgery at respondent hospital. (App. G, 89a-90a).

3. The following table reflects surgical cases performed at respondent hospital by petitioner between 1985 and 1989, together with the number referred by respondent primary care physicians

YEAR	SURGICAL CASES	REFERRED BY RESPONDENTS
1985	210	132
1986	181	86
1987	107	50
1988	61	26

(Cont'd)

respondent primary care physician tendered any evidence concerning the extent of their surgical output within the market between 1986 and 1991. Evidence indicated that, at least by 1993, the volume of surgical output at respondent hospital returned to its pre-1986 levels. (App. G, 146a-147a). Petitioner's statistical data stands as the total output of all surgical services within this market during this time period.

More than 50% of the surgical services consumed in this market prior to 1985 were consumed by patients of respondent physicians who were normally and customarily referred to petitioner by respondent primary care physicians. (App. 150a-151a). There was no evidence that surgical referrals were bought and sold in this or any other geographic market.

Petitioner's evidence also indicated that petitioner and all respondent doctors operated in this same geographic market and that respondent primary care physicians had an active patient base equal to 50% of the population in this market. (App. G, 74a-79a)[4].

Plaintiff also tendered evidence that respondents' post-1989 collective action deprived surgical patients of the least expensive, yet adequate treatment, suitable for the needs of individual patients in a surgical procedure that accounted for as much as 30% of surgical output.[5]

(Cont'd)

1989	38	11
1990	40	7

(App. G, 150a-151a).

4. Four of six respondent primary care physicians admit to 12,780 patients. The total population of this area is 24,300. *See*, note 1, *supra*.

5. The surgical procedure is endoscopy. (App. G, 153a). This respondent (Cont'd)

Plaintiff's staff privileges at respondent hospital were terminated in December, 1991. (App. G, 91a-93a). Termination occurred following the unanimous recommendation of respondent doctors,[6] acting in a professional review proceeding. (App. G, 102a & 124a-137a).

Six charges were adopted against petitioner by respondent hospital's medical staff in August, 1991. (App. G, 94a & 96a). Petitioner tendered evidence indicating that he met with the executive committee of respondent hospital's medical staff, after adoption of these charges, attempting to ascertain the nature of these charges. (App. G, 99a-100a). Petitioner was advised that the charges were his (1) altercation with another respondent doctor; and (2) violation of a June, 1991 admonition he received from respondent hospital's board. (*Id.*). There was no evidence indicating that petitioner received further notice prior to the hearing of the specific grounds adopted by the medical staff on August 12 for its recommendation to the board that petitioner's privileges be revoked.

(Cont'd)
physician performed endoscopy by administering a sedative to a patient, using a nurse anesthetist, the operating room, respondent hospital nursing personnel, and the recovery room (*Id.*). Respondent hospital charged patients for each of these items. (App. G, 140a-143a). Petitioner performed the procedure outside the operating room, administering the sedative with minimal assistance, avoiding these charges.

6. The active medical staff of respondent hospital at this time consisted of petitioner, the six respondent doctors, and one other non-defendant primary care physician. (App. G, 122a). The non-board certified surgeon participated, together with the two respondent doctors who had a joint medical practice which was responsible for performing 90% of the caesarean section surgery at respondent hospital. (App. G, 87a & 90a).

One respondent doctor — Dr. Garcia — and the non-defendant primary care physician did not participate. (App. G, 102a, 124a-137a).

An "ad hoc" committee of respondent hospital's medical staff, consisting of five of the seven respondent physicians, met September 20, to provide petitioner with a hearing regarding suspension and revocation of his clinical privileges. (App. G, 124a-137a).[7] Neither lower court discussed the events that transpired at this hearing, much less mentioned this hearing in their respective opinions. (App. C, 3a-6a & E, 8a-50a).[8]

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7. The district court found that the hearing "was held August 28" and that petitioner attended for "approximately fifteen minutes" (App. E, 29a-30a). The lower court thereafter found that petitioner "opted not to exercise his full rights . . . by leaving proceedings prior to their conclusion . . ." (App. E, 31a). These findings are patently wrong.

Respondents' Statement of Undisputed Facts contends that the hearing was held September 20. (App. G, 86a). Respondent hospital's by-laws provide that interim meetings between an accused physician and the executive committee of respondent hospital's medical staff do not constitute a hearing; are preliminary in nature; and have no procedural safeguards.

The hearing, which was a "professional review action," as defined by both 42 U.S.C. § 11151(9) and respondent hospital's by-laws (App. G, 116a), occurred September 20, and the transcript of the portion in which plaintiff participated covered 40 pages. (App. G, 124a-137a). Prior to deliberations, petitioner was asked to leave by the hearing panel, a request with which he complied (App. G, 131a-132a).

The August 28 date to which the district court referred is the interim meeting between petitioner and respondent hospital's executive committee during which petitioner inquired about the charges against him; he was present for fifteen minutes, before leaving, because he was under suspension. (App. G, 99a-100a).

8. The first thing petitioner did upon arriving at the formal hearing on September 20 was notify the panel members that he was unaware of the charges against him (App. G, 124a).

The colloquy between petitioner and the respondent panel members of

(Cont'd)

Petitioner was denied representation by an attorney at this hearing; respondent hospital's by-laws prohibit representation by an attorney, unless the hearing committee, in its discretion, permits both parties to be represented by counsel.[9] (App. G, 119a & 120a).

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the panel concerning petitioner's lack of knowledge regarding the specific charges against him prior to this meeting is found in the following exchanges:

[Petitioner]:	Can you please, Dr. Burt, tell me what actions I'm explaining?
[Dr. Rankin]:	Your actions on August 6, between you and Dr. Garcia?
[Petitioner]:	What action was that? What am I to respond to? (App. G, 124a-125a).

* * *

DR. GRESHAM:	. . . I thought this meeting was to be where we read the charges to him and he answered them . . .
[Petitioner]:	I think what you're saying is you thought the meeting was that you just read the charges and don't get a chance to respond to anything.
DR. GRESHAM:	No. We'd read the charges and you were supposed to answer them, but you've been asking more questions than you've answered.
[Petitioner]:	I'm sorry if I asked for some procedural rights. . . (App. G, 126a-127a).

9. The August 28 meeting between petitioner and the executive committee of the medical staff of respondent hospital, which is not considered

(Cont'd)

Petitioner also submitted evidence that he was precluded from confronting witnesses at this proceeding who gave testimony against him. Respondent hospital's by-laws specifically conferred the right of confrontation upon petitioner, through cross-examination of witnesses on any matter relevant to the issue of the hearing. (App. G, 120a).

Petitioner proffered evidence indicating that the testimony of one respondent physician, the one with whom petitioner was involved in the altercation, was considered by this hearing committee, without informing petitioner of the substance of that respondent doctor's testimony. (App. G, 128a-129a)[10]

(Cont'd)
to be part of the "hearing process" under the by-laws of respondent hospital, is the "hearing" at which the district court found that petitioner was "afforded the opportunity . . . to appear with counsel" (App. E, 31a), despite the provision in respondent hospital's by-laws to the contrary. *See,* explanation, Note 7, *supra.*

10. The exchange between petitioner and the hearing panel was as follows:

[Petitioner]: And Dr. Garcia's testimony was what?

DR. WALSH: We're not here to talk about that.

DR. BURT: That's not what we're here for Dr. Schueller.

DR. BIRRIE[L]: We want to hear your side.

* * *

DR. BURT: Dr. Garcia made his statement without you being present. You weren't present when he made his statement.

DR. BURT: We asked his opinion of what happened. He gave it and we've asked you the same question . . . (App. G, 128a & 129a).

Petitioner, charged with interfering with physician recruitment,[11] denied any contact with the named physician and tendered evidence that a respondent physician, who served on the hearing panel, offered testimony against petitioner. The respondent physician offered the testimony during the deliberative stage of the hearing, after petitioner had been excused, thereby denying petitioner an opportunity to cross-examine the respondent physician or rebut the testimony given.[12]

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11. The district court characterized this charge as "... attempts to disrupt hospital recruiting..." (App. E, 29a). The only discussion of this charge during the deliberative stage of the proceeding related to attempts made by two respondent physicians serving on the hearing panel to recruit a physician as a potential business associate (App. G, 133a-135a). There is no evidence that the hearing panel discussed respondent hospital's interest in physician recruitment or that respondent hospital ever recruited and/or employed any physician.

12. The exchange between plaintiff and the respondent doctor was as follows:

DR. GRESHAM: We do have somebody that can testify that he did [contact this physician] don't we?

[Petitioner]: Well, I think you ought to present that person right now.

DR. GRESHAM: Maybe we'll present it later. (App. G, 129a-130a).

The proffer, during the deliberative stage, was as follows:

DR. GRESHAM: [Petitioner] also says without any doubt in his mind that he has never met a recruit. . . . I know when Terry Holt was being recruited down here, he made a couple of trips and he did talk to [petitioner]. Also, Mark Abby who we were trying to recruit met him and said hi to him, and was introduced as a possible partner of ours. So there are recruits that he has known that were coming that he has been able to meet. (App. G, 135a).

No summary judgment motion, challenging petitioner's ability to make a *prima facie* case against all respondents, based upon actions transpiring outside professional review (42 U.S.C. § 11101 *et seq*), was pursued beyond the trial court level.[13]

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS IMPOSED A PRODUCT MARKET STANDARD UPON PETITIONER IN A § 1 RULE OF REASON ANALYSIS THAT CONFLICTS WITH DECISIONS OF THIS COURT; TWO NINTH CIRCUIT DECISIONS; AND AN EIGHTH CIRCUIT DECISION, INVOLVING A SIMILAR CLAIM; HAS NO JUDICIAL OR EVIDENTIARY SUPPORT; AND IS UNSUPPORTED BY ANY ECONOMIC ANALYSIS.

The lower court opinions subjected petitioner to a requirement under a rule of reason analysis that no other litigant has ever been required to prove — namely that the "product" component of his market element under the rule is the mechanism through which the market functions to enable a physician to

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13. Among evidence offered by petitioner in support of his claim of combination or conspiracy outside the professional review process was the testimony of respondent hospital's former CRNA who testified that, in his opinion, petitioner was the victim of a conspiracy; and the witness was informed by the former administrator of respondent hospital: "The plan is to let [petitioner] die on the vine and bring in another surgeon. . . ." (App. G, 156a-158a).

The district court opined that this statement, when considered with all other evidence of combination or conspiracy — including the decline in referrals from respondent primary care physicians — ". . . even if true, is not evidence that [respondents] participated, or were even aware of, any plan of conspiracy to boycott [petitioner]. (App. E, 34a).

deliver a product or service to the ultimate consumer (*i.e.* "referrals"),[14] rather than a product market, and ensuing injury to competition, that is based upon an economic analysis (including interchangeability of use; cross-elasticity of demand; and entry barriers to competition).

A "rule of reason" (the "rule") analysis tests a restraint to determine whether the restraint merely regulates, and thereby promotes competition, or suppresses, and perhaps may even destroy competition. *Chicago Board of Trade v. United States*, 246 U.S. 231, 244 (1918). Legality of a restraint of trade under a rule of reason[15] analysis focuses upon the detrimental effects to

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14. The Eighth Circuit concluded that, "... there is no market for referrals, [and found] that even if true, a reduced number of referrals is not evidence of anti-competitive behavior which violates federal antitrust laws ... Thus, the court finds no evidence of actionable anti-competitive conduct." (App. C, 5a). This was the same reasoning that the district court applied to extinguish petitioner's § 2 claim. (App. E, 48a-49a).

Previously, the district court articulated that petitioner's burden under § 1 was to establish a contract, combination, or conspiracy which unreasonably restrains trade. *Eureka Urethane, Inc. v. Professional Bowlers Ass'n of America*, 746 F. Supp at 919 (E.D. Mo. 1990), *aff'd*, 935 F.2d 990 (8th Cir. 1991). (App. E, 38a-39a).

The basis of respondents' summary judgment motions, challenging petitioner's § 1 and 2 claims, was no demonstrable injury to competition. (App. G, 80a-81a).

Despite the district court's recognition that petitioner based his claims upon the, "... continuing, uninterrupted pattern of unlawful conduct from 1985-1991 ..." (App. E, 22a), the district court analyzed the combination or conspiracy element of petitioner's claims as if the claims were based entirely upon the professional review process. (App. E, 23a-24a).

15. Petitioner contended his case was subject to *per se* (Cont'd)

competition by either (a) defining a relevant market and considering evidence of defendant's power within that market; or (b) establishing actual detrimental effects upon competition. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). This Court has taken the position that a "relevant market" can be ascertained only after actual inquiry into the commercial realities faced by consumers. *Eastman Kodak Company v. Image Technical Services*, 112 S. Ct. 2072, 2090 (1992). *See also, White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 499 (6th Cir. 1983) (Relevant market is a legal test applied to the facts of each case).

The term "relevant market" involves elements of both geography and product.[16] *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988). The Ninth Circuit applies an

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(Cont'd)
analysis permitting categorical judgments about business practices that have proven to be predominantly anti-competitive, without necessity of an in depth "rule of reason" analysis. *Northwest Wholesale Stationery, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 274, 289-290 & 294 (1985) (*Per se* rule applicable under circumstances where ". . . 'the practice facially appears to be one that would always or almost always tend to restrict competition and *decrease output* . . .' ", *Northwest* at 289-290, *Emphasis added*); (Appropriate cases include joint efforts to disadvantage competitors by directly denying, persuading, or coercing customers to deny relationships that the competitor needs in the competitive process, *Northwest* at 294).

Petitioner tendered evidence of some degree of competition among all physicians in the market across certain lines of business. Four of five respondent primary care physicians performed low-risk surgical procedures at respondent hospital. (App. G, 104a-105a). The sixth respondent doctor was a non-board certified general surgeon. (App. G, 84a). Petitioner, a board certified general surgeon, also engaged in the general practice of medicine during this period. (App. G, 148a & 152a).

16. There is no dispute regarding the geographical component of this market.

economic analysis focusing upon the pool of goods and services that are reasonably interchangeable; the cross-elasticity of demand among those products; and entry barriers to competition. *Morgan, Strand, Wheeler & Biggs, et al. v. Radiology, Ltd., et al.*, 924 F.2d 1484, 1489-1490 (9th Cir. 1990) ("*MSW&B*"); *Oltz v. St. Peter's Community Hosp., supra* at 1446-1447. *See also, United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) ("market is composed of products that have reasonable interchangeability").

In *MSW&B*, plaintiffs alleged a product market in "referrals" to certain Tucson, Arizona non university medical radiologists. 924 F.2d 1489. The Ninth Circuit, applying the economic analysis focusing upon interchangeability of use and cross-elasticity of demand, concluded that plaintiffs attempted to define the product market in terms of a producer's institutional association, rather than from the consumer's standpoint, looking at a product's characteristics. (*Id.*) Absent evidence that referrals were ever sold, the product market identified was a market for radiologists services. (*Id.*).

MSW&B plaintiffs failed to define a product market because, *inter alia*, they excluded from the market physicians who provided services which were interchangeable with theirs-nonradiologist physicians who performed substantial radiological services. (*Id.*) Moreover, no injury to competition could be shown where entry barriers to physicians desiring to practice radiology were low — the only barrier was the cost of equipping an office, 924 F.2d 1490.

In *Oltz*, the plaintiff, a nurse anesthetist at the only hospital which offered general surgical services in one of Montana's smaller cities, operated as an independent contractor delivering anesthesia services to patients in competition with hospital staff anesthesiologists. 861 F.2d at 1442-1443. The hospital, in

response to threats to leave by its staff anesthesiologists, terminated its existing arrangement with plaintiff and entered into an exclusive contract with its anesthesiologists. 861 F.2d 1444.

The Ninth Circuit, applying this same economic analysis, concluded that the hospital provided the only facility where anesthesia services could be delivered and controlled who provided the services.[17]

The lower courts made neither an inquiry into commercial realities faced by consumers, nor an economic analysis of competing products, to support its finding that the product market was "referrals." In their view, respondents' characterization of petitioner's evidence "[pointing] only to an alleged reduction in the number of referrals during the relevant time period, without more, does not constitute an overt act, [producing injury to

17. A general observation can be made from *MSB&W* and *Oltz*. Harm to competition is more likely to be present where inter-changeability and cross-elasticity are low; and entry barriers to competition are high.

A single physician, operating in a market which has numerous competing providers of the same product priced to consumers at a level approximating the providers' marginal cost, will seldom, if ever, establish lack of inter-changeability and cross-elasticity. Size of the market has little impact. Respondent primary care physicians in this market would encounter the same problem; each offers services that are interchangeable. A single physician's patients have alternative providers available in the same market at substantially the same price. Moreover, entry barriers are low; all that is required is equipping an office.

Conversely, a single physician who is the sole, or predominant, provider of a specialized product will almost always satisfy the injury to competition element. Lack of inter-changeability and cross-elasticity will be high; and where the specialized product must be delivered through a hospital, which (a) controls the identity of the party who can deliver the specialized product; and (b) is the sole provider of hospital services in the market, entry barriers will be high.

competition]." (App. E, 34a). This finding was made despite (1) evidence from petitioner that surgical output within this market decreased from 210 in 1985 to 40 in 1990 (App. G, 150a-151a); (2) an dearth of any statistical data from any respondent indicating that overall surgical output within the market was undiminished between 1985-1989; (3) evidence that the number of surgical cases in this market had, by 1993, recovered to its pre-1985 level (App. G, 146a-147a); and (4) that respondents' post-1989 collective action produced an adverse impact upon price in a surgical procedure that accounted for as much as 30% of surgical output.[18] (App. G, 140a-143a & 153a).

Both lower courts, disdaining any economic analysis, concluded that the only product market which petitioner could establish was in a mechanism through which the market operated to funnel patients to the appropriate provider of the product. The courts' finding requires one to believe that consumers viewed a tonsillectomy as interchangeable with an appendectomy, or a nonsurgical treatment as a substitute for a surgical treatment in each and every instance. Such a conclusion is not only illogical, and unsupportable with any judicial authority, but unsupported by any evidence. There is, however, evidence that entry barriers in this market were high — the only location at which surgical services were delivered in this market was at respondent hospital, and respondent hospital controlled the identity of physicians on its medical staff. (App. G, 61a & 84a).

Petitioner tendered evidence, which viewed in any reasonable light,[19] reflected a relevant product market in surgical

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18. The restriction effectively eliminated the only alternative (petitioner) available to price conscious consumers in the surgical procedure which accounted for 30 of sufgical output in this geographic market (App. G, 143a).

19. *See, Kodak,* 112 S. Ct. at 2083, the non-moving party's inferences need only be reasonable.

services and an adverse impact upon output of that product (1986-1989); and after 1989, an adverse impact upon the price of a surgical procedure accounting for a substantial volume of output within this market.

The Eighth Circuit's affirmation of the district court's opinion casts uncertainty upon the standard to be applied in all § 1 cases arising in the Western District of Arkansas, and implicitly throughout the Eighth Circuit, where those claims arise in some context other than a hospital staffing case and/or professional review actions.[20] Moreover, the Eighth Circuit believes, contrary to the Ninth Circuit, that all physicians, who depend upon referrals as a source of supply of patients to whom they can deliver their product, must prove a market in those referrals in order to survive summary judgment in any § 1 or § 2 case.

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20. In *Flegel v. Christian Hospital, Northeast-Northwest,* 4 F.3d 682 (8th Cir. 1993), two plaintiffs, doctors of osteopathy and both board certified in urologic surgery by the American Osteopathic Association, brought a § 1 claim against a hospital for denial of staff privileges (4 F.3d at 684). Plaintiffs alleged a conspiracy among staff physicians and the hospital to deny the plaintiffs access to the market of patients that would otherwise have been "referred" to them (*Id.*).

This Court, adopting the reasoning of *MSB&W,* rejected plaintiffs proposed product market description, cast in terms of "referrals" (*Id.* at 690); and instead, focused upon a product market described in terms of the medical services available or offered to patients, as the ultimate consumers of those services, within the geographic market served by the hospital. This Court described a "relevant" product market as either ". . . urological services needed by [general practitioner osteopathic physicians'] patients. . . ." (*Id.*) or surgical services (*Id.* at 691).

II.

THIS IS AN ISSUE OF FIRST IMPRESSION RELATING TO THE ROLE WHICH A *PRIMA FACIE* § 1 CASE, BASED UPON ACTS TRANSPIRING OUTSIDE THE PROFESSIONAL REVIEW PROCESS, HAS UPON CHARACTERIZING AN ALLEGED PROFESSIONAL REVIEW PROCEEDING AS ONE WHICH IS UNDERTAKEN AGAINST THE AFFECTED PHYSICIAN "PRIMARILY" UPON SOME BASIS OTHER THAN PROFESSIONAL COMPETENCY OR CONDUCT.

On this record, petitioner holds a *prima facie* case for § 1 violations against all respondents under the du Pont, *MSB&W, Kodak*, and *Oltz* standards, discussed above, when the appropriate product market is applied. No motion, other than the one asserting an evidentiary deficiency on injury to competition, was pursued by respondents, challenging any element of petitioner's case that was based upon activities outside the professional review process. (App. G, 80a-81a). The district court made a specific finding of the geographic scope of the market. (App. E, 34a).

Both lower courts were, in petitioner's view, far more comfortable dealing with petitioner's case as one based *solely* upon a hospital staffing or professional review question; rather than dealing with how a *prima facie* § 1 case outside professional review affects the § 11151(9) definition of what constitutes a valid professional review proceeding. Both lower courts sought to erect a wall around professional review; to analyze petitioner's claims solely and only in relation to the professional review process itself; rather than analyzing professional review in relation to petitioner's *prima facie* claim held outside the process. The district court reduced petitioner's case to one solely involving hospital staffing or professional review by

disregarding petitioner's § 1 claim outside professional review, but eliminating petitioner's § 2 claim, subjecting that claim to the impossible burden of proving a product market in referrals (App. E, 48a-49a). The Eighth Circuit merely extended the impossible burden to petitioner's § 1 claim. (App. C, 5a).

Generally members of a professional review body, participating in a professional review action meeting the 42 U.S.C. § 11112(a) standards, are exempt from monetary damages for any action taken. 42 U.S.C. §11111(a)(1). Professional review action must be undertaken, among other requirements, in the reasonable belief that the action furthers quality health care. 42 U.S.C. § 11112(a)(1). A professional review action is presumed to meet this standard unless the presumption is rebutted by a preponderance of the evidence. *Id.* In somewhat circuitous language, a professional review action excludes from the definition of that term any action that is based primarily upon some matter unrelated to a physician's professional competence or conduct. 42 U.S.C. § 11151(9), last sentence, and subsection (E).

To petitioner, and in the face of the plain language of these statutes, the question was, and remains, what evidence could petitioner proffer to the record that would sustain a jury verdict in petitioner's favor under § 11151(9) that the action was primarily based upon some matter unrelated to petitioner's professional competence or conduct, beyond showing that —

> (a) petitioner held a prima facie § 1 claim against respondent hospital and all respondent physicians participating in the alleged professional review process, based upon acts transpiring completely outside any professional review process;[21]

21. Petitioner's case is *prima facie* when the appropriate product market standard is applied.

(b) there is some evidence that petitioner and the physicians participating in the professional review process compete with each other in certain lines of business[22];

(c) the transcript of the hearing reflects that no witness or other objective information was offered against petitioner, and the hearing consisted entirely of a colloquy between respondent and the participating respondent physicians (App. G, 124a-137a);

(d) there is evidence that the health care entity's professional review process was employed to retaliate against the affected physician for the affected physician's alleged interference in the private economic relationship between two members of the hearing panel and their prospective business associates;[23] and

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22. Petitioner tendered evidence of some degree of competition among all physicians in the market across certain lines of business. Four of five respondent primary care physicians performed low-risk surgical procedures at respondent hospital. (App. G, 104a, 105a). The sixth respondent doctor was a non-board certified general surgeon. (App. G, 84a). Petitioner, a board certified general surgeon, so engaged in the general practice of medicine during this period. (App. G, 148a & 152a).

23. The only discussion of the charge pertaining to interfering with physician recruitment related to petitioner's alleged interference in an attempt made by two hearing panel members to recruit a physician to join their individual medical practice. (App. G, 129a-130a & 133a-135a) There is no evidence that respondent hospital ever attempted to recruit any physician to join its staff. *C.F. Bryan v. J.E. Holmes Regional Medical Center,* 33 F.3d 1318, 1331, N. 22 (11th Cir. 1994) (Third party test may support the conclusion that a pattern of disruptive behavior could become so severe that disciplinary action required).

(e) there is evidence of professional competency[24]

Petitioner finds it difficult to perceive more convincing evidence that would overcome the §11112(a) presumption that the action was undertaken in the reasonable belief that it furthered quality health care, and to sustain a jury verdict in petitioner's favor under § 111151(9), that the action was primarily based upon some matter unrelated to petitioner's professional competence or conduct. Essentially, the only basis upon which the lower courts' actions can be justified is to extinguish petitioners' claims *outside* professional review and analyze his claims solely as a hospital staffing or professional review action.

The district court was much more comfortable analyzing the question of whether a hospital and its medical staff could conspire with each other during the peer or professional review process under the doctrine of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (App. E, 39a-45a) rather than considering the issue before it. The issue is whether evidence of a *prima facie* claim outside professional review, when considered with all other evidence submitted by petitioner, is sufficient to sustain a verdict in petitioner's favor that the alleged professional review action was undertaken for some reason unrelated to petitioner's professional competence or conduct.[25]

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24. One respondent physician, who was chief of respondent hospital's medical staff at the time of the alleged professional review action, admitted that petitioner was a competent surgeon. (App. G, 106a).

25. It seems facially apparent that evidence sufficient to satisfy the requirements under § 11151(9) would also support a finding that petitioner had overcome any statutory presumption that the action was undertaken in the reasonable belief that the action furthered quality health care under § 11112(a)(1). *See, Stafford v. Viggs*, 444 U.S. 527, 535-536 (1980) (All parts of an act on a single subject should be considered and construed together in light of the policy and purpose of the act).

III.

ANY MINIMUM STANDARD OR DUE PROCESS MUST INCLUDE THE RIGHTS OF NOTICE OF CHARGES: RIGHT OF REPRESENTATION BY COUNSEL AT A HEARING; AND THE RIGHT TO CONFRONT WITNESSES OFFERING EVIDENCE.

The lower courts found compliance with the second prong of the two pronged test specified in 42 U.S.C. § 11112(a)(3), adequate notice and hearing procedures were afforded petitioner that were "fair under the circumstances."[26] (App. C, 5a & E, 31a). The district court reached this conclusion by (1) reviewing nothing more than respondents' minimal submission (App. G, 80a-86a); and (2) refusing to view petitioner's evidence in any reasonable light.

The district court found that petitioner's "hearing," as that term is defined in 42 U.S.C. § 11151(9), was ". . . held on August 28, . . . , and [petitioner attended] for approximately fifteen minutes . . ." (App. E, 29a) . . .; and "[elected] not to exercise his full rights . . . by leaving prior to . . . conclusion" (App. E, 31a).

These findings constitute plain error; and contravene requests for factual findings made by both parties.[27] (App. G, 86a). All parties requested a finding that the hearing occurred September 20, a proceeding in which the transcript of the portion in which petitioner participated covered forty pages[28] prior to

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26. The district court did not find that respondent hospital complied with the statutory checklist in §11112(b). (App. E, 31a).

27. *See*, Note 7, *supra*, for an explanation.

28. *See*, Note 7, *supra*.

deliberations, petitioner was asked to leave by the hearing body, a request with which he complied (App. G, 131a-132a).

The lower courts applied some unspecified standard to an interim proceeding (August 28) that neither party requested the lower courts to determine constituted a "professional review action," within the meaning of 42 U.S.C. § 11151(9), and concluded that petitioner received "adequate notice" (App. E, 31a); the right "to appear with counsel" (*Id.*); and implicitly, the right to confront witnesses against him.

A simple, cursory review of respondent hospital's by-laws reflects that it is facially apparent that an affected physician has no right "to [and did not in this instance] appear with counsel" (App. E, 31a) at any respondent hospital proceeding on September 20, the recommendation of which could, and did, adversely affect petitioner's clinical privileges.[29] [App. G, 119a (¶e) & 120a (¶j); §11151(9)].

Petitioner submitted evidence indicating lack of notice of the specific charges prior to the September 20 hearing (App. G, 124a-127a) and deprivation of the right to confront witnesses who gave testimony against him (App. G, 128a-130a). Respondents submitted nothing. What was the lower courts' finding? Both lower courts found that petitioner received both adequate notice (App. C, 5a & E, 31a); and implicitly, the right to confront witnesses, both of which findings are contravened by any fair view of the evidence petitioner submitted, much less the most favorable view of that evidence.

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29. *See, Bryan v. J.E. Holmes Regional Medical Center,* 33 F.3d at 1328, where the affected physician was represented by counsel at hearings, and not only had the right to, but was allowed to cross-examine the witness; and *Austin v. McNamara,* 731 F. Supp. 934, 941 (C.D. Cal. 1990), *aff'd,* 979 F.2d 728 (9th Cir. 1992), where the physician was represented throughout the hearings by counsel.

CONCLUSION

The lower court opinions subjected petitioner to a requirement under a rule of reason analysis that no other litigant has ever been required to prove; which is unsupported by any economic analysis or evidence; and which conflicts with a standard of economic analysis adopted by the Ninth Circuit. Moreover, petitioner has advanced a question of first impression relating the degree of proof necessary to establish that an alleged peer review action under 42 U.S.C. § 11151(9) was undertaken for purposes unrelated to professional competency or conduct. Petitioner has also raised an important issue of the minimum due process applicable under the fair circumstances standard of 42 U.S.C. § 11112(a)(1).

Respectively submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2147WAED

Steven C. Schueller, M.D.,

Appellant,

v.

Clair Norman, et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied.

April 25, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals , Eighth Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2147WAED

Steven C. Schueller, M.D.,

Appellant,

v.

Clair Norman, et al.,

Appellees.

Appeal from the United States District Court for the Western District of Arkansas

Appellant's motion to file an untimely petition for rehearing with suggestion for rehearing en banc has been considered by the Court and is granted.

The petition for rehearing by the panel is denied.

April 3, 1995

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk United States Court of Appeals, Eighth Circuit

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 31, 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2147

Steven C. Schueller, M.D.,

Plaintiff-Appellant,

v.

Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early, Trustees of Crossett Health Foundation; Ashley Memorial Hospital; T. Birriel, M.D.; F. N. Burt, M.D.; E. A. Gresham, M.D.; L. F. Garcia M.D.; J. D. Rankin, M.D.; D. L. Toon, M.D.; B. D. Walsh, M.D.; Crossett Health Foundation; Estate of C. E. Ripley; Betty L. Ripley,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of Arkansas.

[UNPUBLISHED]

Submitted: December 12, 1994

Filed: January 31, 1995

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

Appendix C

PER CURIAM.

In April 1983, Dr. Steven Schueller moved to Crossett, Arkansas, and was granted privileges to practice general surgery at Ashley Memorial Hospital. After two successful years, his relations with referring physicians on the Hospital staff and with Hospital administrators began to deteriorate. Between 1986 and 1990, surgery referrals to Dr. Schueller from other staff physicians declined precipitously. In June 1991, the Hospital's Board of Governors, accepting a recommendation from the medical staff, reprimanded Dr. Schueller for disruptive conduct, including refusing to see patients of other physicians in the emergency room. In August, the medical staff suspended Dr. Schueller for an altercation with another physician at the Hospital, and in December, after a hearing, the Board of Governors revoked his Hospital privileges because of improper conduct and disruptive behavior.

Six months later, Dr. Schueller commenced this action, alleging (i) that the defendant physicians are competitors who violated Sections 1 and 2 of the Sherman Act by conspiring to boycott Dr. Schueller by denying referrals, initiating peer review actions, and depriving him of access to the Hospital, a competitively essential facility; and (ii) that the Hospital violated the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152, by denying Dr. Schueller procedural due process at the suspension and revocation peer review proceedings. After substantial discovery, the district court[1] granted defendants' motion for summary judgment, and Dr. Schueller appeals.

On appeal, Dr. Schueller primarily argues that the district

1. The HONORABLE H. FRANKLIN WATERS, Chief Judge of the United States District Court for the Western District of Arkansas.

court ignored his allegations that the defendant physicians participated in an anticompetitive referrals boycott, conduct wholly outside of the peer review proceedings that are protected by a limited grant of statutory antitrust immunity. *See* 42 U.S.C. § 11111(a); *Austin v. McNamara,* 979 F.2d 728, 733 (9th Cir. 1992). But we conclude that the district court squarely rejected these Sherman Act claims:

> However, as there is no market for referrals, the court finds that even if true, a reduced number of referrals is not evidence of anti-competitive behavior which violates federal antitrust laws; the Sherman Act serves to protect competition in the marketplace and not individual competitors. *See Flegel v. Christian Hospital,* 4 F.3d 682 (8th Cir. 1993). Thus, the court finds no evidence of actionable anticompetitive conduct.

Memorandum Opinion filed April 8, 1994, at p.44. Dr. Schueller further argues that he presented sufficient evidence to avoid summary judgment on the question whether the peer review actions taken against him were procedurally and substantively defective, thereby stripping defendants of peer review immunity; that the district court erred in dismissing the Foundation trustees for lack of evidence; and that the district court abused its discretion in limiting Dr. Schueller's discovery demands.

After carefully considering each of these issues in light of the voluminous summary judgment record before the district court, we affirm for the reasons stated in the district court's thorough Memorandum Opinion. See 8th Circuit Rule 47B.

Appendix C

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS FILED APRIL 8, 1994

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

Civil No. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

v.

CLAIR NORMAN et al.

DEFENDANTS

JUDGMENT

On this 6th day of April, 1994, the court finds, for reasons set forth in its memorandum opinion, that defendants' motion for summary judgment should be and hereby is granted and this action dismissed.

IT IS SO ORDERED.

s/ H. Franklin Waters

United States District Judge

[Filed April 8, 1994]

This document entered on docket in compliance with Rule 58 and 79 (a), FRCP on 1/8/94 by C. Nesbit

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS FILED APRIL 8, 1994

IN THE UNITED STATES DISTRICT COURT
WESTERN DISRICT OF ARKANSAS
EL DORADO DIVISION

Civil No. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

v.

CLAIR NORMAN et al.

DEFENDANTS

MEMORANDUM OPINION

Currently before the court for consideration is defendants' joint motion for summary judgment and plaintiff's response and supplement response thereto. Also before the court is defendants' reply to those responses. As counsel is aware, the court is considering this case upon the district reassignment from Judge Hendren to Judge Barnes and Judge Barnes' subsequent recusal in the matter. The court carefully has considered the motion and is now ready to rule. For the reasons set forth below, the court finds that the motion for summary judgment should be and hereby is granted.

A. Statement of Facts

The undisputed material facts reveal the following: The

plaintiff, Steven C. Schueller, is a board certified member of the American College of Surgeons who was granted staff privileges at Ashley Memorial Hospital in April, 1983. Defendants Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early are members and trustees of the Crossett Health Foundation, an unincorporated, non-profit organization which owns and operates Ashley Memorial Hospital. Defendant Ashley Memorial is a primary care hospital located in Crossett, Arkansas, which serves as the only hospital within a circular geographic area within twenty-five miles of Crossett. Defendants doctors Burt, Gresham, Garcia, Rankin, Ripley (deceased), Walsh and Toon all practice, or at relevant times, practiced in Ashley County, Arkansas. Defendant Dr. Birriel joined the Ashley Memorial staff in 1989.

The events giving rise to this cause of action were initiated in June, 1985, when Mr. Norman Reynolds, who was then the hospital administrator at Ashley Memorial, told Al Smith, a nurse anesthetist, that the hospital intended to let Dr. Schueller "die on the vine" and bring in another surgeon, Dr. Posey. Sometime later in 1985, this statement was related by Smith to Dr. Schueller. In 1986, Ashley Memorial sued Dr. Schueller on a debt in Ashley County Circuit Court, and on April 24, 1987, Dr. Schueller filed a counterclaim, alleging, *inter alia*, that the agents, servants, and employees of Ashley Memorial tried to force him out of the gainful employment of his medical practice and force him to abandon his medical practice by putting unreasonable and restrictive restraints on his practice of medicine and use of the hospital. On October 13, 1987, Dr. Schueller amended his counterclaim, adding that to evidence this unlawful conduct on behalf of Ashley Memorial, he would show that Smith was told by the hospital administrator "don't worry about Schueller. The plan is to let him die on the vine and bring in Dr. Posey." Thereafter, on November 14, 1988, a judgment was entered in the case in favor

of Ashley Memorial on both its complaint and Dr. Schueller's counterclaim. The counterclaim was dismissed with prejudice and costs were assessed against Dr. Schueller.

It is then alleged by defendants that on or about January 24, 1991, Dr. Schueller notified Jim Watters, administrator of Ashley Memorial that he would no longer examine or treat patients of defendant physicians in the hospital's emergency room and on January 28, 1991, Dr. Schueller allegedly refused to see a patient of Dr. Garcia in the emergency room. The following day Dr. Schueller was informed by Mr. Watters and Dr. Toon, chief of staff, that his refusal to see patients of other physicians was a deviation from accepted on-call practices and a special meeting of the medical staff was held on January 31, 1991, to address the emergency room physician on-call policy.

It is alleged that on March 20, 1991, Dr. Schueller sent a letter to Thomas Bartlett, Ashley Memorial administrator at that time, in which he stated his opinion that based on his review of a chart, another physician had made an incorrect diagnosis that led to "negative unnecessary exploratory laparotomy." On May 20, 1991, a committee of the medical staff met to consider eleven allegations of possible disruptive conduct by Dr. Schueller which might adversely affect patient care. Dr. Schueller was present for a portion of that hearing. In June, the medical staff adopted the findings of the committee and recommended to the Board of Governors that Dr. Schueller be reprimanded for conducting an unauthorized and inaccurate peer review and for making unauthorized disclosures of patients' names. The Board of Governors approved the recommendations and admonished Dr. Schueller to cooperate more closely with the staff and the board, be less divisive in his behavior and to follow staff guidelines for emergency room duties. Dr. Schueller was advised of this reprimand by letter on June 19, 1991.

Appendix E

Then on August 6, 1991, Dr. Schueller and Dr. Garcia had an altercation at Ashley Memorial which stemmed from Dr. Garcia's removal of beehives owned by Dr. Schueller from Dr. Garcia's premises.[1] Each doctor swore out arrest warrants against each other with the Crossett police. On August 7, 1991, Dr. Schueller was advised by letter from Dr. Toon and Mr. Bartlett that his staff privileges at Ashley Memorial had been summarily suspended.[2] Five days later, at a specially called meeting, the medical staff voted to recommend to the Board of Governors that Dr. Schueller's clinical privileges be revoked. On August 14, 1991, Dr. Schueller requested a hearing before the executive committee of the medical staff to review his summary suspension. In August 28, 1991, the medical staff voted to recommend a continuation of Dr. Schueller's suspension and a letter was mailed by Mr. Bartlett to Dr. Schueller advising him of this action and his right to a hearing. On September 3, 1991, Dr. Schueller requested a hearing.

On September 20, 1991, a committee of the medical staff met to address six charges of improper conduct and disruptive behavior brought against Dr. Schueller. Dr. Schueller was in attendance during a portion of that meeting. Subsequent to the hearing, the committee voted to continue the summary suspension and revocation of Dr. Schueller's clinical privileges. The medical staff adopted these recommendations and referred the recommendations to the Board of Governors. On December 16, 1991, the Board of Governors at Ashley Memorial conducted a hearing to consider whether Dr. Schueller's privileges should be revoked at which Dr. Schuller was present with counsel. At the

1. It is alleged by Dr. Schueller that Dr. Garcia was carrying a weapon and "pulled it" on Dr. Schueller during this confrontation.

2. Dr. Garcia was also upended and subsequently reinstated.

completion of the hearing, the Board voted to revoke Dr. Schueller's clinical privileges.

Plaintiff filed his action on June 16, 1992, alleging, *inter alia,* that defendants (1) have engaged in a continuing contract, combination, conspiracy, and/or concert of action to unreasonably restrain interstate trade and commerce in the area served by Ashley Memorial Hospital and have engaged in, or aided and abetted, a collective boycott of and refusal to deal with plaintiff, including the "professional peer review" proceedings instituted against plaintiff, in a successful attempt to deny surgical services to consumers in the geographic market in violation of §1 of the Sherman Antitrust Act; and (2) have engaged in the monopolization of the practice of medicine at Ashley Memorial, denying plaintiff access to a facility which is essential to plaintiff's continued practice of medicine in violation of section two of the Sherman Antitrust Act. Plaintiff also contends that defendants have revoked plaintiff's clinical privileges at Ashley Memorial in violation of the Health Care Quality Improvement Act of 1986. Plaintiff contends that these actions have an adverse effect on competition in the geographic area and have completely and totally destroyed the value of plaintiff's medical practice. Plaintiff seeks damages, a permanent injunction enjoining defendants from further action, and reinstatement of his rights and privileges at Ashley Memorial.

B. Summary Judgment

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds. *Holloway v. Lockhart,* 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme Court has issued the following guidelines for trial courts to determine whether this standard has been satisfied.

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). *See also Agristor Leasing v. Farrow*, 826 F.2d 732 (8th Cir. 1987); *Niagara of Wisconsin Paper Corp. v. Paper Industry Union - Management Pension Fund*, 800 F.2d 742, 746 (8th Cir. 1986).

The Eighth Circuit Court of Appeals has advised trial courts that summary judgments should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). The Court has recently reviewed the burdens of the respective parties in connection with a summary judgment motion. In *Counts v. M.K.-Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988), the court stated:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, '[to] point[] out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on

> any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339, quoting, *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted) (brackets in original).

However, the Court of Appeals for this circuit has also held that the court, in ruling on the motion for summary judgment, must give the non-moving party "the benefit of the reasonable inferences that can be drawn from the underlying facts." *Fischer v. NWA, Inc.*, 883 F.2d 594, 598 (8th Cir. 1989) (*citing Trnka v. Elanco Products*, 709 F.2d 1223 (8th Cir. 1983).

1. Crosett Health Foundation

As a preliminary matter with respect to defendant Crossett Health Foundation, defendants assert that plaintiff's complaint is fatally deficient as to the trustees of the foundation on several grounds. First, defendants contend that none of the above individuals are physicians or medical care providers. Second, defendants assert that plaintiff's complaint makes no specific allegations with respect to these individuals and that discovery has not uncovered any such evidence. And last, defendants contend that none of the foundation trustees had any involvement with respect to the revocation of plaintiff's medical staff privileges. Thus, defendants contend that the trustees of the Crossett Health Foundation are entitled to judgment as a matter of law.

Appendix E

In response, plaintiff first contends that there is no law requiring that conspirators be physicians to incur liability under the Sherman Act as defendants have implied. Plaintiff also notes that if their status is relevant, there is no evidence that the trustees either are or are not physicians or medical care providers and thus a question of fact remains as to their status. Plaintiff then contends that the trustees are capable of conspiring with the hospital under the theory that a corporation can conspire with directors, officers or employees when they act on their own behalf rather than in their capacities as agents for the corporation.

In reply, defendants contend that plaintiff has churned up "unsubstantiated, self-serving facts to suggest" that the trustees were involved in the alleged misconduct, missing the point that his complaint states no facts, claims or causes of action against these individuals. Since all of plaintiff's claims seem to be aimed at Ashley Memorial and the defendant physicians, defendants contend that the trustee defendants should be dismissed.

The court agrees with defendants, finding no facts pled by plaintiff in his complaint and no evidence in the record that the named trustees of the Crossett Health Foundation were in any way involved in the alleged unlawful conduct. Moreover, there has been no allegation that the trustees of the unincorporated, non-profit organization have incurred liability under any other theory. The court finds, therefore, that defendants Clair Norman, Herman Hamilton, Jr, William S. Arnold, Ned Hastings and Roosevelt Early should be and hereby are dismissed from this action.

2. Collateral Estoppel and *Res Judicata*

Defendants then contend that plaintiff's antitrust claims are barred by collateral estoppel and *res judicata*, stating that on

April 24, 1987, plaintiff filed a counterclaim in the Ashley County Circuit Court case of *Crossett Health Foundation d/b/A Ashley Memorial Hospital v. Steven C. Schueller,* No. 86-249-1 (the "state court action"). Defendants contend that plaintiff's allegations in this lawsuit are plainly identical to those issues raised in the state court action, as reflected in plaintiff's amended counterclaim filed on October 13, 1987. Defendants further contend that on November 14, 1988, an Ashley County jury found against plaintiff on his breach of contract counterclaim, noting that the Ashley County Circuit Court previously had directed a verdict against plaintiff on the remainder of his counterclaims. Thus, defendants argue that plaintiff has done nothing more than "window dress" his prior state law claims as violations of the Sherman Antitrust Act in a blatant attempt to relitigate his claims. Defendants request that plaintiff's claims be dismissed under the theory of either collateral estoppel or *res judicata.*[3]

In his response, plaintiff contends that his counterclaim and participation in the 1987 state court action has no preclusive effect upon his current antitrust claims as these claims could not have been raised in the state court action as a matter of the "jurisdictional competency requirement." Plaintiff argues that in light of Supreme Court precedent, Arkansas' preclusionary law is inapplicable to plaintiff's Sherman Antitrust Act claims because jurisdiction over those claims is vested exclusively within federal courts. Plaintiff argues that as the Ashley County Circuit Court never had jurisdiction of plaintiff's antitrust claims, any ruling in the underlying state court action could have no preclusive effect in this action.

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3. Defendants note that although the individual defendants in this case were not parties to the previous state court action, defendants argue that the doctrines still apply because the other defendants were in privity with the Ashley Memorial Hospital.

Defendants have replied to this response, citing a decision of the Court of Appeals for the Eighth Circuit as support for their conclusion that plaintiff cannot simply restyle as federal claims the claims which he previously lost in state court. Requesting that the court put form over substance when reviewing plaintiff's federal complaint and state law counterclaims, defendants again argue that plaintiff's action should be dismissed under the doctrines of *res judicata* and collateral estoppel.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), the Supreme Court stated that

> [t]he preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effects of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82, (1982); *see also Allen v. McCurry*, 449 U.S. 90, 96 (1980).

Id. at 380. Like the case presently before the court, Marrese involved federal antitrust claims and the Marrese opinion directly addressed plaintiff's contention that since exclusive jurisdiction over antitrust claims lies within federal court, such claims cannot be barred, as a matter of law, by previous state court judgments:

> The fact that petitioner's antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case. Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts. . . . § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment.

Id. at 380-81. However, the Court found that "[w]ith respect to matters that were not decided in the state proceedings, we note that claim preclusion generally does not apply where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.' " *Id.* at 382, citing Restatement (Second) of Judgments § 26(1)(c) (1982). Thus, "[i]f state preclusion law includes this requirement of jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts." *Id.* at 382.

In determining what Arkansas' preclusion law provides, the court looks to the decision of *Crockett & Brown, P.A. v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993), where the Arkansas

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Supreme Court discussed *res judicata* and collateral estoppel as follows:

> *Res judicata,* or claim preclusion, bars subsequent action on the same claim where a final judgment has been rendered by a court of competent jurisdiction. *Toran v. Provident Life & Accident Ins. Co.*, 297 Ark. 415, 764 S.W.2d 40 (1989) (citing Restatement of Judgments, 2d, § 19 (1982)). Four elements must be met for res judicata to apply: (1) the first suit must have resulted in a final judgment on the merits, (2) the first suit must be based on proper jurisdiction, (3) both suits must involve the same cause of action, and (4) both suits must involve the same parties or their privies. *Robinson v. Buie*, 307 Ark. 112, 817 S.W.2d 431 (1991).
>
> Collateral estoppel, or issue preclusion, bars relitigation of issues, law or fact, actually litigated in the first suit. *See Toran v. Provident Life & Accident Ins. Co. supra.* For collateral estoppel to apply, the following elements must be met: (1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) that issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the judgment. *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993).

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If under Arkansas law, plaintiff is precluded from litigating his claims in state court, he cannot pursue them in federal court unless the prior state proceeding did not provide plaintiff with a full and fair opportunity to present his claims. *Gahr v. Trammel,* 796 F.2d 1063, 1066 (8th Cir. 1986) (citations omitted). A party receives a fair opportunity to present the claims allegedly precluded if the party could have brought the claims in a proceeding that would satisfy the minimal procedural requirements of the due process clause. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1981).

The court agrees with plaintiff that he cannot be precluded from pursuing a claim that he neither could nor did raise in the prior state proceeding. The doctrine of *res judicata* seeks to put an end to vexatious litigation; it does not seek to prevent an injured party from reaching the courthouse doors on a claim neither litigated nor litigable in the prior lawsuit. *See Gahr,* 796 F.2d at 1067. Arkansas' preclusion law requires that the state court have proper jurisdiction over a claim before an adjudication of that claim precludes subsequent litigation. Clearly, as jurisdiction over Sherman Antitrust Act claims lies exclusively within federal court, the state court did not have proper jurisdiction and thus plaintiff's antitrust claims were not litigable in the prior lawsuit. The court finds, therefore, that plaintiff's claims are not barred by either res judicata or collateral estoppel and summary judgment on this theory is hereby denied.

3. Health Care Quality Improvement Act of 1986

The court notes that this appears to be a case of first impression in the Eighth Circuit in which defendants in a federal antitrust action seek judgment by asserting immunity under

provisions of the Health Care Quality Improvement Act of 1986 ("HCQIA"). Stating that the HCQIA was enacted as a means of encouraging professional peer review by protecting participants from private civil litigation — specifically federal antitrust claims — defendants contend that the basis of plaintiff's antitrust lawsuit is the peer review which ultimately resulted in the revocation of plaintiff's hospital privileges. Alleging that the professional peer review action met all of the standards specified by the HCQIA as required for immunity and alleging further that the peer review is entitled to a statutory presumption of compliance with the standards, defendants contend that they are immune from any potential antitrust liability under provisions of the HCQIA.[4]

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4. Defendants also contend that count four of plaintiff's complaint, brought against only Ashley Memorial Hospital, asserting that the hospital violated the HCQIA, fails to state a claim for which relief can be granted because the HCQIA does not provide for an independent, private cause of action. Defendants contend that the HCQIA merely provides for immunity from suit and therefore count four should be dismissed. Plaintiff argues that count four should not be dismissed because plaintiff properly and adequately has pled pendent state law claims of interference with a business or economic enterprise. In their reply, defendants contend that a plain reading of count four of plaintiff's complaint fails to state a claim for interference with business expectancies or contractual relationships as plaintiff has argued, again contending that this count should be dismissed.

The court agrees that count four should be dismissed. The HCQIA provides only for limited immunity from civil damages incurred as the result of professional peer review action and does not provide for an independent, private right of action. The court also finds the complaint deficient of any state law claim for interference with a business or economic enterprise. Count four is entitled "Schueller v. AMH — Suspension of Privileges — Violation of Health Care Quality Improvement Act — Denial of Due Process" and no where within the six paragraphs of count four does plaintiff allege a claim under state law or even hint at alleging any claim other than one under the HCQIA. Accordingly, count four is dismissed for failure to state a claim against Ashley Memorial Hospital for which relief can be granted.

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Plaintiff's first contention in response is that the immunity provided by the HCQIA is limited only to liability for money damages and does not bar plaintiff's request for injunctive relief. Plaintiff then contends that under the facts and circumstances of this case there is no immunity under HCQIA for liability for money damages, stating that the basis of his claims are not "peer review" as characterized by defendants.

Instead, plaintiff urges that the basis for his complaint is defendants' continuing, uninterrupted pattern of unlawful conduct from 1985-1991 in violation of the Sherman Antitrust Act. Plaintiff contends that the "peer review" conducted in 1991 was nothing more than the final step in a series of mutually dependent acts beginning in 1985 with the "die on the vine" statement. Plaintiff further argues that defendants may not use the HCQIA to insulate themselves from antitrust liability for unlawful conduct occurring in 1985-1991 by conducting the professional "peer review" proceedings in 1991. In support, plaintiff refers the court to the legislative history of the HCQIA, stating the HCQIA provides immunity only for those instances where physicians injure their patients through incompetent or unprofessional service and does not provide immunity from prior unlawful conduct. Plaintiff argues that the alleged "peer review" was nothing more than a part of a continuing, integrated pattern and plan of unlawful conduct in violation of the antitrust laws. Plaintiff contends that this unlawful conduct on behalf of defendants cannot, under the facts and circumstances of this case, be immunized by the HCQIA.

Plaintiff also challenges defendants' assertion that the alleged "peer review" proceedings were adequate under the provisions of the HCQIA, stating that the hearing procedures must be "fair under the circumstances." Plaintiff contends that

the panel which recommended revocation of plaintiff's clinical privileges was composed of his direct economic competitors, persons with the ability to take significant amounts of business away from each other, and was therefore tainted. Thus, plaintiff argues that he has more than adequately satisfied the standards to overcome the statutory presumption of professional peer review legitimacy. Plaintiff concludes that there are genuine issues of fact regarding whether plaintiff's clinical privileges were terminated by his direct economic competitors for reasons of professional competency or for anti-competitive purposes.

By way of reply, defendants again contend that the HCQIA bars plaintiff's request for relief, restating their position that plaintiff's action rests upon the "peer review" proceedings and that those proceedings, first entitled to a presumption of validity, met each of the statutory requirements for immunity. Defendants contend that plaintiff has presented no facts which rebut the statutory presumption of validity with respect to those proceedings. Additionally, defendants criticize plaintiff's characterization of the peer review panel as "direct economic competitors," noting plaintiff's prior argument that he was the only member of the Ashley Memorial staff board certified in surgery. Nevertheless, assuming that other physicians at Ashley Memorial performed limited surgical procedures, defendants contend that these physicians are not "direct economic competitors" of plaintiff and thus the peer review panel was not tainted. Even if the panel had contained such competitors, defendants contend that this alone does not bar the immunity found within the HCQIA.

First, the court finds plaintiff's argument that his action is not based upon the professional peer review conducted by members of the Ashley Memorial staff to be completely without

merit. Examination of plaintiff's complaint immediately reveals that plaintiff is challenging not only the peer review process and proceedings but also the final decision of the Board of Governors to revoke his clinical privileges at Ashley Memorial, characterizing each as illustrative of antitrust violations. This conclusion is supported by plaintiff's repeated references to the "peer review" proceedings as well as the suspension and termination of his medical privileges; this includes but is not limited to, references in paragraphs 18, 19, 37, 38, 39, 40, 42, 43, 44, 47, 52, 53, 54, 55 and 57 of his complaint. Thus, the court finds that plaintiff's action is based, at least in part, upon the professional peer review proceedings conducted by Ashley Memorial and therefore the provisions of the HCQIA are relevant and applicable to this matter.

When it promulgated the HCQIA in 1986, Congress made the following findings:

1. The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts that those that can be undertaken by any individual State.

2. There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

3. This nationwide problem can be remedies through effective professional peer review.

4. The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

5. There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11101. To address the concerns identified in its findings, Congress provided for limited liability[5] in connection with professional peer review action[6] taken by a professional review body[7] provided that the action meets specified standards. *See* 42 U.S.C. § 11112(a).

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5. *See* 42 U.S.C. § 11111.

6. "Professional review action" is defined as "an action or recommendation of a professional review body which is taken or made in the conduct of a professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action." 42 U.S.C. § 11151(9).

7. "Professional review body" is defined as "a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body is a professional review activity." 42 U.S.C. § 11151(11).

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The defendants can qualify for immunity under the HCQIA if they can demonstrate that the (1) professional review actions complied with the standards set forth in 42 U.S.C. § 11112, (2) results of the peer review were reported properly to the state authorities in compliance with 42 U.S.C. §§ 11131(c)(1), 11151(2), and (3) professional review actions occurred after November 14, 1986, the effective date of the HCQIA. *See Austin v. McNamara*, 731 F. Supp. 934, 939 (C.D.Cal. 1990), *aff'd*, 979 F.2d 728 (9th Cir. 1992). There is no dispute that the professional peer review at issue in this matter occurred after November 14, 1986, and there has been no assertion by plaintiff that the results of the peer review were not reported to the appropriate state authorities. In fact, plaintiff has challenged the fact that information regarding his suspension was released to the National Practitioner Data Bank. The only issue for application of immunity, therefore, is whether defendants complied with the statutory requisites for immunity found in § 11112(a).

Specifically, for a professional review body to be protected by the HCQIA's immunity[8], the action of that body must be taken,

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing

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8. The immunity available is limited to protection from "damages under any law of the United States or of any State," excepting any civil right proceedings. 42 U.S.C. § 11111(a)(1).

> procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11112(a).

After examining the Ashley Memorial documents submitted by the parties, the court believes that, as a matter of law, the professional peer review proceedings conducted with respect to the plaintiff meet the statutory requirements for immunity. Inquiries into plaintiff's practice which eventually led to revocation of plaintiff's clinical privileges were initiated because of plaintiff's alleged "disruptive behavior and conduct not consistent with that of the professional staff of the hospital." Report of Board of Governors Meeting, April 17, 1991. Apparently, this inquiry in 1991 followed a series of conflicts between plaintiff and members of the hospital board and staff which began sometime after plaintiff joined the Ashley Memorial staff. *See* Report of Special Board Meeting, July 30, 1986; Report

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of Executive Committee Meeting, August 4, 1986; Report of Board of Governors Meeting, August 27, 1986; Letter to Dr. Steven Schueller, August 28, 1986.

On May 8, 1991, Steve McAdams, Chairman of the Board of Governors, directed Dr. Toon, at that time Chief of Staff for Ashley Memorial, to take corrective action pursuant to the medical staff Bylaws to investigate conduct which McAdams labeled as "potentially adversely affecting patient care." Examples of such disruptive and unprofessional activities included plaintiff's acceptance of a referral for vascular surgery which was beyond the capabilities of the hospital; evidence of unauthorized impromptu peer review of other physicians' patients' files and unauthorized public disclosure of patient information; unilateral revision of emergency room procedures inconsistent with the practices of the medical staff; refusal to attend emergency room patients while on emergency room call; declaration of policy with respect to unassigned patients in emergency room; disruptive conduct at medical staff meetings; written demands to hospital administrator demanding changes in emergency room schedule; publicizing efforts to jeopardize the hospital's tax-exempt status; publicizing through press releases differences in opinions with hospital personnel; accusation of criminal conduct by hospital publicized in press releases; and attempts to perform surgery in hospital without appropriate equipment and personnel.

Thereafter, on May 13, 1991, Dr. Toon appointed Drs. Rankin, Gresham, Walsh, Thompson and Garcia to an ad hoc committee to interview Dr. Schueller and make recommendations pertinent to the numerous allegations contained in McAdam's letter. Plaintiff received notice of this action. *See* Letter of Dr. Toon, May 13, 1991. On May 20, 1991,

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Dr. Rankin reported to the hospital the results of the interview with Dr. Schueller and recommended that a letter be sent to Dr. Schueller encouraging closer cooperation with the staff and the Board in the functions of the hospital, less divisive behavior, and adherence to the hospital's emergency room policies. On May 28, 1991, Dr. Toon notified McAdams and the Board of Governors of the committee's recommendation. At a meeting of the Board of Governors on June 19, 1991, the Board accepted the recommendation. During this meeting, the Board also reviewed a letter by Dr. Schueller to the Joint Commission on Accreditation of Healthcare Organizations dated May 14, 1991. On July 30, 1991, the Board requested that the staff review the letter and determine whether this letter should be viewed as "disruptive behavior."

At a meeting on August 6, 1991, the medical staff executive committee met and determined that the letter was inappropriate and disruptive. The meeting also addressed the altercation between Drs. Schueller and Garcia which had occurred that day. On August 12, 1991, the medical staff met to discuss these matters and recommended to the Board that Dr. Schueller's clinical privileges be revoked based on the following: the letter to the accreditation commission; the inability to locate Dr. Schueller while on emergency room call on May 20, 1991; the altercation between Drs. Schueller and Garcia on August 6, 1991; two instances by Dr. Schueller of disruptive and offensive videotaping in the hospital; attempts to disrupt hospital recruiting; and other various instances of disruptive behavior. On August 14, 1991, Dr. Schueller requested a hearing on the clinical privilege suspension.

The hearing was held on August 28, 1991, and Dr. Schueller was in attendance for approximately fifteen minutes. At the

conclusion of the hearing, the committee made the recommendation to the Board to continue Dr. Schueller's suspension. A review of the committee's action was requested by Dr. Schueller and this was conducted on September 20, 1991. The ad hoc committee reviewed the documentation and evidence was presented which was made a part of the record. At the conclusion of the meeting, the decision to continue Dr. Schueller's suspension and revocation of clinical privileges was reached and the staff also voted to terminate Dr. Schueller from the medical staff. Then, on December 16, 1991, the Board of Governors voted to accept the recommendations that Dr. Schueller's clinical privileges be suspended and that he no longer be allowed to practice at Ashley Memorial.

This professional peer review is entitled to a statutory presumption of compliance with the HCQIA until rebutted by a preponderance of the evidence and the court believes that plaintiff has neglected to present evidence which overcomes this presumption. Moreover, the court finds that the staff members which conducted the peer review did so with the "reasonable belief that the action was in the furtherance of quality health care." *See* 42 U.S.C. § 11112(a)(1). This objective "reasonable belief" standard is satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients. H.R. Rep. No. 903, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6393. The court finds that the ad hoc committee, the medical staff and the Board of Governors, armed with the information available to them at the time of the professional review action, "reasonably concluded that their action would restrict incompetent behavior or would protect patients." Thus, the court finds that subsection (a)(1) of § 11112 has been satisfied.

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The court is also satisfied that defendants made a reasonable effort to obtain the facts with respect to Dr. Schueller's disruptive conduct. The inquiry which was initiated in April of 1991 did not culminate in a final decision until December of that year. During that time, the ad hoc committee, composed of staff members in accordance with the hospital's bylaws, internally investigated the matter, interviewed Dr. Schueller and conducted numerous meetings and hearings at which Dr. Schueller was given the opportunity to discuss the allegations against him. The court believes that the evidence is supportive of the conclusion that every effort was made to obtain the facts of this matter. *See* 42 U.S.C. § 11112(a)(2).

For similar reasons, the court likewise believes that adequate notice and hearing procedures are afforded to Dr. Schueller which were fair under the circumstances and thus finds that subsection (a)(3) has been satisfied. Although failure to comply with the specific notice and hearing requirements of § 11112(b)(1), without more, does not "constitute failure to meet the standards of subsection (a)(3) of this section," the court believes that there is sufficient evidence to conclude that Dr. Schueller received due process. Dr. Schueller was given notice that professional review action had been proposed along with the reasons for such action and was afforded the opportunity to request a hearing and to appear with counsel. Dr. Schueller requested a hearing and one was conducted. There is even evidence in the record meetings of the ad hoc committee were rescheduled to accommodate Dr. Schueller. The court is satisfied that plaintiff was given the opportunity to adequate process and evidence in the record that plaintiff opted not to exercise his full rights thereto by leaving proceedings prior to their conclusion does not render the proceedings defective. *See* § 11112(b)(3)(B).

The court also finds that it was the reasonable belief of the medical staff and Board of Governors of Ashley Memorial that the action taken with respect to Dr. Schueller "was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3)." Accordingly, immunity extends to defendants under the HCQIA in their capacity as a professional review body with regard to the professional review action culminating in revocation of plaintiff's clinical privileges at Ashley Memorial.

4. Sherman Antitrust Act
a. Statute of Limitation

As immunity under the HCQIA extends only to liability for damages which may be incurred in plaintiff's antitrust case and as plaintiff is also seeking injunctive relief, the court must continue its discussion under the Sherman Antitrust Act. With respect to plaintiff's antitrust claims, defendants first contend that these claims are barred by the applicable four (4) year statute of limitation as provided by the Clayton Act. Stating that this action was filed on June 16, 1992, defendants contend that any claims asserted by plaintiff which accrued prior to June 16, 1988, are barred. Specifically, defendants contend that plaintiff was aware of the purported conspiracy to violate the Sherman Antitrust Act as early as 1985 when Mr. Al Smith, a nurse anesthetist, allegedly told plaintiff that there was a "plan" at the hospital to let the plaintiff "die on the vine" and then to bring in another surgeon. Mr. Smith allegedly learned of this "plan" from Mr. Norman Reynolds, the administrator at that time of Ashley Memorial Hospital. Defendants characterize this act as the "only cognizable overt act" upon which plaintiff can base his antitrust claims.

Moreover, defendants urge that plaintiff was aware of his

antitrust claims by 1987 when he filed his counterclaim in the state court action asserting essentially the same allegations and including the alleged "die on the vine" statement. Additionally, defendants contend that plaintiff's allegations that his income was diminished from 1986 to 1990 as a result of the alleged misconduct on the part of defendants is further evidence that plaintiff was aware, prior to June 16, 1988, that his potential antitrust claims were accruing. Alternatively, defendants argue that these losses suffered by plaintiff are simply "continuing effects" or "merely the abatable but unabated inertial consequences of some pre-limitations" conduct. Thus, defendants argue that since all of plaintiff's antitrust claims accrued prior to June 16, 1988, with only "continuing effects" of a previous overt act rather than "fresh instances" of overt acts since that time, each of plaintiff's antitrust claims are barred by the statute of limitation.

Plaintiff admits that the period for which he can recover damages is limited to that period June 17, 1988, forward. Plaintiff, however, challenges defendants' characterization of the losses suffered by plaintiff as simply the "continuing effects" of some pre-limitations conduct. Rather, plaintiff contends that fresh acts of conspiracy and a continuing implementation of the boycott and refusal to deal with the plaintiff occurred between June 17, 1988, and June 16, 1992, the date upon which plaintiff filed his complaint. Plaintiff alleges that the defendants implemented the "die on the vine" plan during each of the years since 1988, providing as evidence the alleged decrease in referrals from the 1985 level, by eighty percent in 1988, ninety-two percent in 1989, and ninety-five percent in 1990. Plaintiff then contends that his surgical practice received permanent injury in 1991 when his credentials were revoked and plaintiff was unfairly associated with incompetent physicians through inclusion of his name in the National Practitioner Data Bank.

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Unlike the cases argued by defendants, plaintiff asserts that a business relationship was maintained between plaintiff and defendants throughout 1990, and that each act of boycott and refusal to deal created a new cause of action. Plaintiff then cites several examples of "fresh acts" within the limitations period which, if believed and aggregated with previous acts, allegedly indicative of a continuing conspiracy on behalf of defendants.

Defendants' reply is that plaintiff has presented insufficient evidence of overt acts occurring after June 17, 1988, to support his antitrust claims. Defendants contend that plaintiff's evidence, which points only to an alleged reduction in the number of referrals during the relevant period of time, without more, does not constitute an overt act, arguing again that the Sherman Act protects competition and not competitors. Then defendants assume, for the sake of argument, that even if referral reduction was experienced, plaintiff has failed to demonstrate that the referrals were part of any antitrust conspiracy or collective boycott. Defendants contends that the hospital administrator's alleged "die on the vine" statement, even if true, is not evidence that the defendants participated, or were even aware of, any plan of conspiracy to boycott plaintiff.

The court believes that plaintiff has presented little evidence which can be construed as overt acts of conspiracy by defendants occurring since June, 1988. However, as the court finds that plaintiff's antitrust claims are barred for substantive reasons discussed herein, the court finds it unnecessary to participate in any lengthy statute of limitations discussion and summary judgment on this basis is hereby denied.[9]

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9. Defendants make a similar argument under the equitable doctrine of laches, contending that plaintiff's claims are barred even if the applicable statute of limitations has not expired. Based upon the rulings contained herein, the court also

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b. Merits of the Antitrust Claims

Defendants argue that plaintiff cannot prevail on the merits of his antitrust claims, contending primarily that plaintiff has failed to demonstrate any actual injury to competition as required. Turning first to plaintiff's boycott claims under §1 of the Sherman Act, defendants state that as a threshold matter plaintiff is required to demonstrate that the alleged misconduct had a detrimental effect on competition in the relevant market or that defendants had "market power" in the relevant market. Defendants contend, however, that plaintiff cannot show that Ashley Memorial Hospital had the requisite "market power" in the relevant market or that the alleged misconduct of defendants had any detrimental impact on competition. According to defendants, there can be no injury because there was no competition in the relevant market, a twenty-five mile radius of Crossett, Arkansas.

Defendants then address plaintiff's monopolization and attempted monopolization claims under §2 of the Sherman Act, stating first that, for the purposes of the motion for summary judgment, defendants admit the existence of a "natural" monopoly but deny its illegality. Defendants contend that although Ashley Memorial Hospital is the sole provider of surgical services as a primary care facility within the 25 mile radius of Crossett, the hospital's monopoly status is the result of economies of scale since the relevant market can accommodate only one provider of these services. Defendants argue, therefore, that the hospital meets the Eighth Circuit's definition of a

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(Cont'd)

finds it unnecessary to delve into any substantive discussion with respect to the doctrine of laches and summary judgment based upon laches is hereby denied.

"natural" monopoly and for that very reason, cannot be held liable under §2 of the Sherman Act.

Defendants next argue that the "essential facility" doctrine is inapplicable to the facts of this case. Stating that plaintiff narrowly defined the relevant market so as to assert that Ashley Memorial is an "essential facility" and thus must make its facilities available to the plaintiff as the only means by which plaintiff can practice his profession, defendants contend that the practice of medicine in Arkansas is a privilege subject to regulation and revocation and is not a physician's right. Defendants thus contend that it would be inappropriate to apply a doctrine which would prevent hospitals from restricting unqualified doctors from the practice of medicine.

Defendants' final contention with respect to plaintiff's antitrust claims is that even if Ashley Memorial has market power or a monopoly in the relevant market, this status does not extend to surgical services. Defendants assert that strictly speaking the hospital does not offer surgical services but rather permits doctors to offer these services at it facility. Characterizing plaintiff's argument as one in which the hospital leverages its power in the market for hospital facilities by controlling the market for surgical services, defendants contend that this theory should be rejected. Defendants contend that Ashley Memorial cannot monopolize or attempt to monopolize the surgical services market because the hospital does not provide these services, only the space in which the services may be performed. Furthermore, the hospital does not prevent a doctor from obtaining privileges at another facility; doctors tend to practice in the most convenient hospital. Thus, defendants contend that Ashley Memorial cannot participate or realistically control the market for surgical services and therefore the antitrust claims against the hospital should be dismissed.

Responding to these contentions, plaintiff criticizes defendants for characterizing his §1 Sherman Antitrust Act claims as based simply upon the peer review or hospital credentials. Plaintiff reiterates that his claims are ones for continuing conspiracy to boycott and refusal to deal with the plaintiff, conspiracy to monopolize the practice of medicine within the market served, and actual collective boycott and refusal to deal with the plaintiff. Recognizing that an indispensable element of these claims is "harm to competition" or an "anticompetitive injury," plaintiff contends that the output of surgical services in the market has been restricted as the result of defendants' anticompetitive activities. Plaintiff also contends that there is clear evidence of non-competitive prices for health care services as defendants have the power to control prices in the market.

Plaintiff cites as evidence the endoscopy procedures performed in the hospital operating room at Ashley Memorial by Dr. Birriel which were determined by a peer review organization of board certified surgeons and gastroenterologists to generally be a waste of medical resources. In 1993, the Georgia-Pacific Health Care Plan also commented upon the high costs of gastric procedures prevailing at Ashley Memorial. Plaintiff contends that he has performed the same procedures outside of the hospital operating room with minimal assistance resulting in lower charges to the patient and the insurer. The result of lower output and higher prices, according to plaintiff, is that surgical patients in this market are deprived of the least expensive, yet adequate treatment, which is suitable for the needs of the patients. Thus, consumers of medical services must either pay the increased cost or go outside the relevant market to obtain the services.

Turning to his §2 Sherman Antitrust Act claims, plaintiff

first points out that defendants' argument urging dismissal of count two against Ashley Memorial was without merit because Ashley Memorial not charged in count two and thus plaintiff does not object to such a dismissal. Plaintiff contends, therefore, that defendants' argument with respect to Ashley Memorial's status as a natural monopoly for purposes of count two was a waste of valuable resources. Plaintiff notes, however, that the same analysis does not apply to count three, the conspiracy to monopolize claim, in that Ashley Memorial's status as a natural monopolist has nothing to do with whether the physician defendants and others, including the hospital, conspired to monopolize the practice of medicine at Ashley Memorial.

Contrary to defendants, plaintiff then argues that the "essential facility" doctrine applies to the facts of this case. Plaintiff contends that the doctrine would be inapplicable in a simple "peer review" case, reiterating his contention that the basis of his claims is not "peer review" but rather conspiracy to boycott, monopolize and refusal to deal under the Sherman Act. Plaintiff points out that nothing in defendants' motion for summary judgment addresses conspiracy.

i. Section One Claims

Plaintiff has asserted that defendants violated §1 of the Sherman Antitrust Act, which states, in pertinent part, that

> [e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several states, ... is hereby declared illegal.

15 U.S.C. § 1 (1982). Not surprisingly, the courts of this circuit

have required proof of two essential elements in any action under §1: (1) a contract, combination, or conspiracy, which results in (2) an unreasonable restraint of trade. *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915 (E.D. Mo. 1990), *aff'd*, 935 F.2d 990 (8th Cir. 1991).

Plaintiff contends that defendants engaged in a conspiracy to harm plaintiff's medical practice. A conspiracy imports a plurality of persons acting in concert to attain a "common goal or purpose." *Eureka Urethane*, 746 F. Supp. at 930. Accordingly, the Supreme Court, in *Fisher v. City of Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), recently reiterated that § 1 of the Sherman Act prohibits only unreasonable restraints of trade "effected by a 'contract, combination . . ., or conspiracy' between *separate* entities." *Id.* at 1049, quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (emphasis in original). Thus, §1 applies only to concerted action; unilateral action is excluded from its purview. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984).

Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. The court, therefore, must proceed to determine whether defendants and their agents and employees are separate entities for the purpose of a §1 conspiracy. Under the facts of this matter, the court believes that the staff of Ashley Memorial is acting as an agent of Ashley Memorial during the peer review process and as such is distinct from the hospital.

This view is premised upon the 1984 Supreme Court case of *Copperweld Corp. v. Independence Tube Corp., supra,* which set forth a principle of intracorporate immunity to be applied in §1

cases. In *Copperweld,* the issue before the Court was whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by §1 of the Sherman Act, constitute a combination or conspiracy. The "intra-enterprise conspiracy" doctrine, recognized by the Court to have been derived from earlier Supreme Court decisions, had provided that §1 liability was not foreclosed merely because a parent and its subsidiary are subject to common ownership.

Recognizing that "[t]he Sherman Act contains a 'basic distinction between concerted and independent action,' " and that "the conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization," the Court proceeded to analyze whether a parent and subsidiary could act only in concert, thus giving rise to a §2 action, or whether they could act independently or unilaterally, and thus providing a cause of action under only §1 of the Act. The Court stated that "[t]he distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms 'contract, combination. . . or conspiracy' in §1." *Id.* at 769.

The court then proceeded to address the nature of actions taken by corporate officers and employees, corporate divisions and subsidiaries. Finding that internal agreements and actions of corporate officers and employees pursuant to a single firm's policies do not raise the antitrust dangers which §1 was designed to prevent, the court stated that

> [t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

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> Coordination within a firm is as likely to result from an effort to compete as from a single effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.

Id. at 769. The Court likewise recognized that the conduct of an unincorporated division of a corporation was to be considered, for purposes of §1, as the conduct of a single actor:

> The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

Id. at 770-71. The court then, for similar reasons, held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purposes of §1

of the Sherman Act." *Id.* at 771. The court found that the parent and it subsidiary have a "complete unity of interest," with common objectives. *Id.*

> They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § scrutiny.
>
> Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when the "conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." [citation omitted]. But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design."
>
> * * * *
>
> Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine "imposes

> grave consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

Id. at 771, 773. Thus, the Court held that while a corporation's initial acquisition of control is subject to scrutiny under 1, thereafter, a corporation and its wholly owned subsidiary are fully subject only to §2 of the Sherman Act and cannot conspire within the meaning of §1.

The court thinks that a similar unity of interest is present in the relationship between the hospital and its staff with both seeking to upgrade the quality of patient care through physician review. Examining the substance rather than the form of the relationship between hospital and staff, the court finds itself aligned with those circuits recognizing the applicability of intracorporate immunity to professional peer review proceedings. *Oksanen v. Page Memorial Hospital,* 945 F.2d 696 (4th Cir. 1991), *cert. denied,* 112 S.Ct. 973, 117 L.Ed.2d 137 (1992); *Nurse Midwifery Assoc. v. Hibbett,* 918 F.2d 605 (6th Cir. 1990), *cert. denied,* 112 S.Ct. 406, 116 L.Ed.2d 355 (1991); *Nanavati v. Burdette Tomlin Memorial Hospital,* 857 F.2d 96 (3d Cir. 1988), *cert. denied,* 489 U.S. 1078, 109 S.Ct. 1528, 103 L.Ed.2d 834 (1989). Like a corporation delegating authority to its officers, the Board of Governors at Ashley Memorial delegated peer review decisionmaking in the first instance to the medical staff, and thus, with respect to those decisions, the medical staff operated as an officer of a corporation. *See Weiss v. York Hospital,* 745 F.2d 786, 817 (3d Cir. 1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). In effect, the medical staff was acting as an agent of the Board in evaluating the conduct and

competence of those to whom the hospital extended privileges. At all times, the Board had ultimate control over the peer review and could modify the staff's recommendations, retaining the ultimate responsibility for the conduct of the hospital. And as the staff is a component part of the hospital and not its competitor, the court finds that this decision to conduct peer review proceedings does not implicate the concerns of §1 of the Sherman Act. *See Nurse Midwifery,* 918 F.2d at 614 ("There are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and medical staff are not competitors.) Thus, as a matter of law, the court believes that plaintiff's §1 Sherman Act claims are barred.

Although plaintiff's response to defendants' summary judgment motion fails to address a recognized exception to the *Copperweld* doctrine of intracorporate conspiracy, plaintiff hints at conflicts of interests among defendants, characterizing them throughout his motion as his "direct economic competitors." Thus, the court feels compelled to discuss the decision of *Pink Supply Corp. v. Hiebert, Inc.,* 788 F.2d 1313 (8th Cir. 1986), in which the Eighth Circuit recognized an exception to the general principle of Copperweld that agents of a corporation cannot conspire within the meaning of § 1:

> When the interests of principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal, they may be legally capable of engaging in an antitrust conspiracy with their corporate principal.

Id. at 1317. Recognizing the availability of such an exception, the

court finds that there has been no evidence presented which would allow the court to conclude that members of the hospital staff were "acting beyond the scope of their authority or for their own benefit rather than that of the principal" when conducting the professional peer review proceedings. To the contrary, the evidence illustrates that members of the Ashley Memorial staff acted, at all relevant times, pursuant to the instruction of the Board of Governors and further, that the Board retained ultimate control over the investigation and hearing proceedings directed at plaintiff. Moreover, the court is unpersuaded that defendants were "direct economic competitors" of plaintiff as plaintiff elsewhere argues that he was the single board certified surgeon on staff at Ashley Memorial. Thus, the court concludes that the physician defendants were legally incapable of engaging in a §1 antitrust conspiracy with Ashley Memorial.

The court believes that such a conclusion makes for good public policy. Penalizing coordinated conduct in the health care context would not only discourage hospitals from investigating their medical staffs but also discourage members of the staff from participating in such proceedings. One of the benefits of peer review is that physicians may be evaluated to determine if they have achieved a certain level of professional competence, benefiting both individual patients and the community at large. This is one of the reasons Congress passed the HCQIA, discussed at length above, and any potential antitrust threat to the peer review process is at odds with Congress' intent to encourage the process by granting immunity to participants.

ii. Section Two Claims

The plaintiff has also alleged violations of §2 of the Sherman Act. Section 2 of the Act subjects to prosecution

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> [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . .

15 U.S.C. § 2 (1988). To establish monopolization in violation of §2, the plaintiffs must show: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, ___ U.S. ___, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992), citing *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (other citations omitted).

Monopoly power is defined as the "power to control prices and exclude competition with respect to a particular product and within a particular geographic market." *Eureka Urethane, Inc. v. PBA, Inc.*, 746 F. Supp. 915, 924 (E.D. Mo. 1990), *aff'd*, 935 F.2d 990 (8th Cir. 1991), citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). Thus, plaintiff must show that the defendants have "dominant market share in a well-defined relevant market." *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986). The court is required, therefore, to define the relevant market by reference to both the product market and the geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502; 8 L.Ed.2d 510 (1962); *Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n*, 938 F.2d 846, 850 (8th Cir. 1991). The essential test for ascertaining the relevant product market involves the identification of those products or

services that are either (1) identical to or (2) available substitutes for the defendants' products or services. *United States v. E.I. du Pont de Nemours & Co.*, 352 U.S. at 377. This comparative analysis has been characterized as the "reasonable interchangeability" standard. *Eureka Urethane*, 746 F. Supp. at 922.

Furthermore, a competitor may possess monopoly power in a submarket. A market can be divided into submarkets and may be determined by examining (1) the industry or public recognition of the submarket as a separate economic entity; (2) the product's peculiar characteristics and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes and (7) specialized vendors. *Brown Shoe Co.*, 370 U.S. at 325.

While the court tends to believe that Ashley Memorial, the only hospital within a twenty-five mile radius of Crossett, Arkansas, possesses a dominant market share in a well-defined, if small, market for hospital services, a mere showing of monopoly power in the relevant market, unaccompanied by evidence of anti-competitive behavior, is insufficient to support a claim for monopolization. *Trace X Chemical*, 738 F.2d at 266. Thus, the second element of a section 2 claim requires proof of "either (1) specific intent to monopolize or (2) anticompetitive effects that result from the monopolist's actions." *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir.1984), *cert. denied*, 469 U.S. 872 (1984), citing *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). One need not prove both specific intent and anticompetitive effects; either alone is sufficient basis for the imposition of liability for an actor possessing monopoly power. *Id.* However, liability based upon specific intent may be negated where valid business justifications exist for the monopolist's actions. *Id.* at 697.

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Anti-competitive conduct is conduct without a legitimate business purpose. *Becker v. Egypt News Co.*, 713 F.2d 363, 366 (8th Cir. 1983). Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2. *Telex Corp. v. IBM*, 510 F.2d 894, 925-26 (10th Cir.), *cert. dismissed*, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975):

> The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its "anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power."

Trace X Chemical, 738 F.2d at 266. Rather, acts which would constitute an unlawful use of monopoly power are those "derived from [the monopolist's] power in the market or its size, . . . acts which could have been performed by one with the requisite power." *Id.* at 266, citing *Telex Corp. v. IBM*, 510 F.2d at 926.

An examination of the documentation submitted to the court reveals that no genuine issues of fact exist with respect to the presence of specific intent to monopolize the market or of anti-competitive conduct on behalf of defendants. Defendants contend that all actions taken with respect to the plaintiff were taken for a legitimate business and professional purpose — to recommend the appropriate action to be taken pursuant to the hospital's bylaws and professional peer review proceedings. Plaintiff has presented no evidence of anti-competitive behavior by defendants except for his assertion that defendants stopped

making physician referrals to plaintiff. However, as there is no market for referrals, the court finds that even if true, a reduced number of referrals is not evidence of anti-competitive behavior which violates federal antitrust laws; the Sherman Act serves to protect competition in the marketplace and not individual competitors. *See Flegel v. Christian Hospital,* 4 F. 3d 682 (8th Cir. 1993) . Thus, the court finds no evidence of actionable anticompetitive conduct.

Plaintiff also alleges that defendants conspired to monopolize or attempted to monopolize commerce and trade under §2 of the Act and have the burden of proving the following elements: (1) defendants' specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anti-competitive conduct on behalf of defendants directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *See Trace X. Chemical,* 738 F. 2d at 265. An antitrust plaintiff, alleging an attempted monopolization, must prove the existence of "methods, means and practices which would, if successful, accomplish monopolization, and which, falling short, nevertheless approach so close as to create a dangerous probability of it . . . ." *American Tobacco Co. v. United States,* 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).

For the same reasons discussed above with respect to plaintiff's §1 claims, the court finds that defendants could not, as a matter of law, conspire or attempt to conspire to monopolize trade and commerce. Thus, the court finds that summary judgment for defendants on all of plaintiff's §2 claims is also appropriate and is hereby granted.

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5. Conclusion

For the reasons discussed above, the court finds that (1) defendants Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings and Roosevelt Early are hereby dismissed from this action, finding no facts pled by plaintiff in his complaint and no evidence in the record that the named trustees of the Crossett Health Foundation were in any way involved in the alleged unlawful conduct; (2) count four of plaintiff's complaint should be and hereby is dismissed as against Ashley Memorial Hospital as it fails to state a claim for relief; (3) immunity from liability for Sherman Antitrust Act damages be granted for defendants Ashley Memorial Hospital and Drs. Birriel, Burt, Gresham, Garcia, Rankin, Ripley, Toon and Walsh pursuant to the Health Care Quality Improvement Act of 1986; and (4) summary judgment should be and hereby is granted for defendants Ashley Memorial Hospital and Drs. Birriel, Burt, Gresham, Garcia, Rankin, Ripley, Toon and Walsh on plaintiff's §1 and §2 Sherman Antitrust Act claims. Summary judgment is granted and this action is hereby dismissed.

IT IS SO ORDERED.

s/ H. Franklin Waters
United States District Judge

APPENDIX F — RELEVANT STATUTES INVOLVED

15 U.S.C. § 1 provides, in part, as follows:

> Every contract, . . . , or conspiracy, in restraint of trade or commerce among the several States, . . . , is hereby declared to be illegal.

42 U.S.C. § 11151(b)(9) provides, in part, as follows:

> The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of a physician. . . In this title, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on —
>
> . . .
>
> (C) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,
>
> . . .

(E) any other matter that does not relate to the competence or professional conduct of a physician.

42 U.S.C.S. § 11111 provides, in part, as follows:

(1) Limitation on damages for professional review actions. If a professional review action [42 U.S.C.S. § 11151(9)] of a professional review body meets all the standards specified in . . . 42 U.S.C.S. §11112(a), except as provided in subsection(b) —

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

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42 U.S.C.S. §11112 provides, in part:

> (a) For purposes of the protection set forth in . . . 42 U.S.C.S. § 11111(a), a professional review action must be taken —
>
> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in . . . 42 U.S.C.S. § 11111(a) unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing. A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action. The physician has been given notice stating —

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing. If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating —

(A) the place, time, and date, of the

hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice. If a hearing is requested on a timely basis under paragraph (1)(b)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

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(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right —

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right —

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3).

APPENDIX G — EXCERPTS FROM THE RECORD

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO.:_____

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL, M.D.; DR. F.N. BURT, M.D.; DR. E.A. GRESHAM, M.D.; DR. L.F. GARCIA, M.D.; DR. J.D. RANKIN, M.D.; DR. C.E. RIPLEY, M.D.; DR. D. L. TOON, M.D.; DR. B.J. WALSH, M.D.; JOHN DOE #l; and JOHN DOE #2

DEFENDANTS

COMPLAINT

The Plaintiff, Dr. Steven C. Schueller, M.D., by and through his attorneys, WELCH, MATHIS & ADCOCK, for his Complaint, states and alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked under 28 U.S.C. Sections 1331 and 1337(a). This action is based upon alleged violations of the Sherman Anti-Trust Act (15 U.S.C. Section 1, *et seq.*).

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2. Venue lies under 28 U.S.C. Section 1391 (b); and all Defendants either reside in and/or transact substantial amounts of business and commerce in Ashley County in the State of Arkansas, all within the Western District of Arkansas.

PARTIES

3. Dr. Steven C. Schueller, M.D. ("Schueller") is a duly licensed physician by the State of Arkansas, and a Board Certified Fellow of the American College of Surgeons.

4. Crossett Health Foundation ("CHF") is an unincorporated association or non-profit corporation which owns and operates Ashley Memorial Hospital ("AMH").

5. Ashley Memorial Hospital ("AMH") is a non-profit, private corporation providing health care and related services in Crossett, Arkansas.

6. Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early are individuals acting as the trustees of CHF.

7. Defendants Dr. T. Birriel, M.D., Dr. F. N. Burt, M.D., Dr. E. A. Gresham, M.D., Dr. L. F. Garcia, M.D., Dr. J. D. Rankin, M.D., Dr. C. E. Ripley, M.D., Dr. D. L. Toon, M.D. and Dr. B. J. Walsh, M.D. are individual physicians who reside in, and engage in the practice of medicine, in Crossett, Arkansas, performing various medical services according to training, credentials, and specializations.

8. Defendant(s) John Doe are unknown individuals, corporations, partnerships or associations who, in concert with

the named defendants, participated in, encouraged, organized or otherwise engaged in the illegal activities alleged herein. The names of these Defendants are best known to the Defendants and are outside the present scope of Schueller's knowledge, though Schueller has reason to believe in the existence of these individuals, partnerships, corporations or associations.

GENERAL

9. Schueller has practiced medicine and surgery at AMH at all times material and relevant hereto.

10. Schueller was recruited and induced to move from Iowa to Crossett in 1983 for the purpose of establishing a medical and surgical practice in Crossett.

11. CHF acts through the three individual trustees named herein as defendants.

12. AMH is governed by a Board of Governors, consisting of seven (7) to fifteen (15) individuals, all of whom are appointed by the Trustees of CHF.

13. Control of the practice of medicine at AMH was delegated to a self-governing body known as the AMH Active Medical Staff (the "Active Medical Staff") between 1982 and the present date.

14. Control of the practice of medicine by the Active Medical Staff was one of the requirements which AMH had to satisfy to receive accreditation from the Joint Commission of Accreditation of Hospitals.

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15. Generally, the Active Medical Staff (or some committee thereof) was responsible for all phases of AMH medical policy, including, but not limited to, extending AMH "privileges" to physicians; "credentialing" physicians; and recommending disciplinary action against physicians, subject to approval by the AMH Board of Governors.

16. Physician "privileges" denote that a particular physician has been authorized to admit patients to a particular hospital; and to avail himself of the medical, technical and other support services offered by that hospital for the purpose of providing patient treatment.

17. Physician "credentials" denote the particular medical procedures that the physician is authorized to perform at a hospital at which the physician may hold "privileges."

18. Professional competency or professional conduct of an individual physician at a health care institution, such as AMH, is controlled through a procedure known as "professional review" or "peer review."

19. Generally, "peer review" determines whether the physician may have "privileges" at a health care facility, such as AMH; the scope and conditions of such "privileges" (i.e., the "credentials"); and changes or modifications to the physician's "privileges" (including revocation and dismissal).

20. The medical doctors named herein as defendants individually (together with Schueller and others not named as Defendants) comprised the AMH Active Medical Staff between 1985 and December 16, 1991, with the exception of Dr. Tomas Birriel, M. D., who became a member of the AMH Medical Staff in 1989.

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21. Each medical doctor, who was a member of the AMH Medical Staff (including Schueller and others who were not named as defendants) has an independent, private medical practice; and each medical doctor's private medical practice is, unless lawfully joined with another medical doctor in a partnership or as a shareholder in a professional association, potentially in competition with all other medical doctors who were members of the AMH Active Medical Staff. Those who have lawfully joined together in a partnership or as a shareholder in a professional association are potentially in competition, through ownership of that partnership or professional association, with all other medical doctors who were members of the AMH Active Medical Staff.

22. Members of the Active Medical Staff (including Schueller and others who were not named as defendants) marketed their medical services to the general public separately and independently of each other, unless lawfully joined in a partnership or as members of the same professional association; and if so joined, marketed their medical services to the general public through such organization, separately and independently of each other.

23. Members of the Active Medical Staff (including Schueller and others not named as defendants) also marketed their medical services to the general public separately and independently of the medical services offered to the general public by AMH; and Active Medical Staff members (including Schueller and the others not named as defendants) billed for the medical services which they rendered to patients admitted to AMH separately and apart from the medical services which AMH charged to patients admitted to AMH by physicians holding "privileges" at AMH.

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24. Between 1982 and the present date, AMH engaged an individual as its employee who held the managerial position at AMH as "hospital administrator." The hospital administrator, who reported to the AMH Board of Governors, was responsible for overseeing and managing the day-to-day operations of AMH.

* * *

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VIOLATIONS ALLEGED

COUNT I. SCHUELLER V. ALL DEFENDANTS — SHERMAN ACT SECTION 1, HORIZONTAL CONSPIRACY — COLLECTIVE BOYCOTT

33. Schueller restates, realleges and incorporates the provisions of paragraphs 1 through 32, inclusive herein, as if fully set out word for word.

34. Beginning on a date best known to AMH and the defendant doctors who are members of the Active Medical Staff, but continuing during the five year period immediately preceding December 16, 1991, AMH and the Defendant doctors who are members of the Active Medical Staff, and each of them, together with other known and unknown individuals, firms, corporations, associations, partnerships, and/or joint ventures, have engaged in a continuing contract, combination, conspiracy and/or concert of action to unreasonably restrain interstate trade and commerce in the area served by AMH.

35. As part of such unlawful conduct, AMH and each of the defendants who are members of the Active Medical Staff, have engaged in, or have aided and abetted, a collective boycott of Schueller in a successful attempt to deny the consumers of surgical services in the geographic area served by AMH (a) the full range of surgical services which a "board certified" surgeon could offer at AMH; (b) the right to select the physician of their choice to render surgical services to them at AMH; and (c) the right to purchase a broader range of surgical services from AMH than is otherwise available from a surgeon who is less skilled, less qualified, and less experienced than Schuelier.

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36. The contract, combination and conspiracy, consists of a continuous understanding, agreement, and/or concert of action among the trustees of CHF, the members of the AMH board of governors, employees and agents of AMH, and the defendant physicians who are members of the AMH Active Medical Staff the substantial purpose of which was to boycott and refuse to deal with Schueller, thereby (a) effectively prohibiting Schueller from performing surgical services at AMH, an essential facility for that purpose; (b) denying patients at AMH the right to select Schueller as the physician of their choice from whom to purchase surgical services at AMH; and (c) substantially reducing the range of surgical services available to consumers of surgical services at AMH.

37. The common purpose to collectively boycott Schueller was initiated, implemented, and effectuated by the CHF trustees, the AMH Board of Governors, employees and agents of AMH, and the defendant physicians who are members of the Active Medical Staff, all of whom engaged in one or more of the following activities:

(a) Initiating unfounded and baseless challenges to Schueller's "credentials" to perform certain surgical procedures which were advanced by the AMH hospital administrator.

(b) Initiation of "peer review" actions, involving attempts by the AMH hospital administrator to secure "peer review" of Schueller's surgical cases by the AMH Active Medical Staff, by outside consultants, and third party "peer review" organizations.

(c) Seeking to initiate disciplinary proceedings against Schueller, alleging the improper prescription of narcotics for a patient suffering pain, based upon the charges of the hospital administrator.

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(d) Blocking Schueller's succession to the post Chief of the AMH Active Medical Staff, a post which would have elevated Schueller to the AMH Board of Governors, because of Schueller's disagreements with the AMH Board of Governors over AMH policy and questions raised regarding the conduct of AMH financial affairs in transactions in which self-dealing and improper financial inurement of the AMH Board of Governors and their affiliates was involved.

(e) Threatening Schueller with summary dismissal from the AMH staff and loss of AMH "privileges" because of Schueller's public disagreement with AMH Board of Governor's policies relating to hospital management and policy and the conduct of AMH financial affairs.

(f) Summarily suspending Schueller in December 1991 from all AMH "privileges" following an alleged "peer review" proceeding conducted by members of the AMH Active Medical Staff who are defendants herein, the basis of which was Schueller's alleged "disruptive behavior," and which was totally unrelated to Schueller's professional competency or conduct.

38. The 1991 alleged "peer review" action, which resulted in Schueller's loss of "privileges" at AMH, was initiated by the AMH Board of Governors; and was conducted by members of the AMH Active Medical Staff who are defendants herein and who were actual or potential competitors of Schueller for the delivery of medical services at AMH.

39. The 1991 "peer review" action, which resulted in Schueller's loss of "privileges" at AMH, was not undertaken by the AMH Board of Governors or the members of the AMH Active Medical Staff who are defendants herein (i) in the reasonable

belief that the action furthered the quality of health care at AMH; (ii) after a reasonable effort was made to obtain all facts; (iii) after adequate notice and hearing procedures were established to safeguard Schueller's rights; or (iv) in the reasonable belief that the "peer review" action was warranted by the facts known, after first undertaking a reasonable investigation to obtain all facts and providing procedural safeguards and adequate notice to Schueller.

40. Moreover, the outcome of the 1991 "peer review" action which resulted in the revocation of Schueller's "privileges" at AMH was not reported to the Arkansas State Medical Board within a period of one (1) month, as required by law.

COUNT II. —

SCHUELLER V. ALL INDIVIDUAL DEFENDANT MEMBERS OF ACTIVE AMH MEDICAL STAFF — SHERMAN ACT SECTION 2 — COLLECTIVE REFUSAL TO DEAL — ESSENTIAL FACILITY

41. Schueller restates, realleges and incorporates the provisions of paragraphs 1 through 40, inclusive herein as if fully set out word for word.

42. The defendant physicians who are members of the AMH Active Medical Staff constitute a majority of the members of that body during the relevant period of time in this case.

43. As a majority of that body, the defendant physicians who are members of the AMH Active Medical Staff controlled the identity of physicians who received "privileges" at AMH; the

* * *

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

v.

CLAIR NORMAN, et al

DEFENDANTS

SEPARATE ANSWER OF DEFENDANTS
GRESHAM, GARCIA, RIPLEY, TOON AND WALSH

For their answer to plaintiff's complaint, defendants E.A. Gresham, M.D., L.F. Garcia, M.D., C.E. Ripley, M.D., D.L. Toon, M.D., and B.J. Walsh, M.D., ("These Defendants") state the following:

1-2. The allegations contained in paragraphs 1 and 2 of the complaint state conclusions of law to which no response is required. In the event that these paragraphs are deemed to contain any allegations of fact, These Defendants deny them.

3-6. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 through 6 of the complaint.

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7. Admit the allegations contained in paragraph 7 of the complaint, as those allegations pertain to These Defendants. To the extent that these allegations pertain to other defendants, These Defendants are without knowledge or information sufficient to form a belief as to the truth of those allegations.

8. The allegations contained in paragraph 8 of the complaint are directed to "John Doe" defendants, and These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8. However, These Defendants specifically deny that the names of the "John Doe" defendants are best known to them, and not to the plaintiff.

9-11. These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 9 through 15 of the complaint.

12. These Defendants admit the allegations contained in paragraph 12 of the complaint.

13-15. These Defendants deny the allegations contained in paragraphs 13 through 15 of the complaint and aver that "control" of the practice of medicine and foundation of policies at AMH was the responsibility of the AMH Board of Governors.

16-19. These Defendants admit the allegations contained in paragraphs 16 through 19 of the complaint.

20. These Defendants admit the allegations contained in paragraph 20 of the complaint, as they pertain to them. These Defendants are without knowledge or information sufficient to form a belief as to the truth of these allegations, as they may pertain to other defendants.

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21. These Defendants admit the allegations contained in the first sentence of paragraph 21 of the complaint as those allegations pertain to them, except they specifically deny the statement that they are " . . . potentially in competition with all other medical doctors who were members of the AMH Active Medical Staff." These Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations

* * *

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, AND ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION, ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; DR. C.E. RIPLEY; DR. D.L. TOON; DR. B.J. WALSH; JOHN DOE #1; AND JOHN DOE #2

DEFENDANTS

ANSWER

Come Defendants, Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, Roosevelt Early, Trustees of Crossett Health Foundation, Ashley Memorial Hospital, Dr. T. Birriel, Dr. F.N. Burt, and Dr. J.D. Rankin (hereinafter collectively referred to as "Defendants"), by and through their attorneys, Mitchell, Williams, Selig, Gates & Woodyard, and for their Answer to Plaintiff's Complaint, state:

1. To the extent paragraphs 1 and 2 state facts, they are denied. Defendants affirmatively state that jurisdiction and venue is not proper in this court.

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2. Defendants admit paragraphs 3 through 6 of Plaintiff's Complaint.

3. Defendants admit the allegations contained in paragraph 7 of Plaintiff's Complaint to the extent they pertain to these Defendants. To the extent the allegations pertain to

* * *

10. Defendants admit the allegations contained in paragraphs 15 through 18 of Plaintiff's Complaint.

11. Defendants admit that various committees, generally known as peer review, in accordance with the AMH Medical Staff By-Laws, make recommendations with respect to a physicians request for privileges subject to final approval by the Board of Governors. Defendants deny the remaining allegations contained in paragraph 19 of Plaintiff's Complaint.

12. Based on the wording of paragraph 20 of Plaintiff's Complaint, Defendants deny the non-specific language of paragraph 20 of Plaintiff's Complaint. Defendants admit that Dr. Birriel and the other defendant doctors listed herein were members of the AMH active medical staff.

13. Defendants are without sufficient information or knowledge to admit or deny the allegations contained in paragraphs 21 through 23 of Plaintiff's Complaint and, therefore, deny such allegations.

14. Defendants admit that for a period of years, AMH has had an individual known as the hospital administrator who reports to the AMH Board of Governors and who is responsible

for overseeing the management of the hospital. Defendants deny that the administrator has always been an employee of the hospital and the remaining allegations contained in paragraph 24 of Plaintiff's Complaint.

15. Defendants deny the allegations contained in paragraph 25 of Plaintiff's Complaint. Certain of these

* * *

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

No. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, ET AL.

DEFENDANTS

AFFIDAVIT OF Nancy S. Toon R.N.

Nancy S. Toon, R.N., being first duly sworn, states on oath to the following:

1. My name is Nancy S. Toon RN. I am the office manager for D. L. Toon, both of whom are defendants in this lawsuit. I have served as their office manager for 26 years.

2. As office manager, I am responsible for overseeing and maintaining all business records, including charts on all patients. There are more than 5000 charts. More than 90 percent of the charts are maintained on current patients.

3. I have reviewed the plaintiff's first set of interrogaories and requests for production of documents propounded to all defendants in this case. To respond to Interrogatories 14, 15 and 17, our staff personnel would be required to physically retrieve

all patient charts, review each chart to determine if a referral was made, and if so, to whom that referral was made. I would estimate that at best, an average of 5 charts could be reviewed by each staff member each hour, and a more realistic estimate would be 5 charts an hour. Consequently, as many as 900 man hours would be required from staff personnel to respond to these discovery requests.

4. The foregoing statements are true to the best of my information and belief.

s/ Nancy S. Toon, R.N.

STATE OF ARKANSAS
COUNTY OF ASHLEY

SUBSCRIBED AND SWORN to before me, a Notary Public, this 3 day of August, 1992.

s/ Bruce D. Switzer
Notary Public

My Commission Expires:
1-23-93

[Stamped]
OFFICIAL SEAL
BRUCE D. SWITZER
NOTARY PUBLIC - ARKANSAS
ASHLEY COUNTY
My Commission Expires: 1-23-93

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

No. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

vs.

CLAIR NORMAN, ET AL.

DEFENDANTS

AFFIDAVIT OF PAMELA ANDREWS

Pamela Andrews, being first duly sworn, states on oath to the following:

1. My name is Pamela Andrews. I am the office manager for Dr. L. F. Garcia, a defendant in this lawsuit. I have served as his office manager for four years.

2. As office manager, I am responsible for overseeing and maintaining all business records, including charts on all patients. There are more than 8,200 charts. More than 40 percent of the charts are maintained on current patients.

3. I have reviewed the plaintiff's first set of interrogatories and requests for production of documents propounded to all defendants in this case. To respond to Interrogatories 14, 15 and 17, our staff personnel would be required to physically retrieve

all patient charts, review each chart to determine if a referral was made, and if so, to whom that referral was made. I would estimate that at best, an average of four charts could be reviewed by each staff member each hour, and a more realistic estimate would be two charts an hour. Consequently, as many as 4,100 man hours would be required from staff personnel to respond to these discovery requests.

4. The foregoing statements are true to the best of my information and belief.

s/ Pamela Andrews
Pamela Andrews

STATE OF ARKANSAS
COUNTY OF ASHLEY

SUBSCRIBED AND SWORN to before me, a Notary Public, this 11 day of Aug., 1992.

s/ JoAnn Johnson
Notary Public

My Commission Expires:
1-9-02

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

No. 92-1075

DR. STEVEN C; SCHUELLER, M.D.

PLAINTIFF

VS

CLAIR NORMAN, ET AL.

DEFENDANTS

AFFIDAVIT OF PHYLLIS ROMANS

Phyllis Romans, being first duly sworn, states on oath to the following:

1. My name is Phyllis Romans. I am the office manager for Drs. E. A. Gresham and B. J. Walsh, (d/b/a G&W Family Clinic), both of whom are defendants in this lawsuit. I have served as the clinic's office manager for four years.

2. As office manager, I am responsible for overseeing and maintaining all business records, including charts on all patients. There are more than 10,000 charts. More than 50 percent of the charts are maintained on current patients.

3. I have reviewed the plaintiff's first set of interrogatories and requests for production of documents propounded to all defendants in this case. To respond to Interrogatories 14, 15 and

17, our staff personnel would be required to physically retrieve all patient charts, review each chart to determine if a referral was made, and if so, to whom that referral was made. I would estimate that at best an average of 10 charts could be reviewed each hour, and a more realistic estimate would be five charts [5 charts per person per hour.] an hour. Cosequently, as many as 2,000 man hours would be required from staff personnel to respond to these discovery requests.

4. The foregoing statements are true to the best of my information and belief.

s/ Phyllis Romans
Phyllis Romans

STATE OF ARKANSAS
COUNTY OF ASHLEY

SUBSCRIBED AND SWORN to before me, a Notary Public, this 30th day of July, 1992.

s/ Sandra R. Raney
Notary Public

My Commission Expires:
5/9/2000

[Stamped]
NOTARY PUBLIC
ARKANSAS
SANDRA R. RANEY
ASHLEY, CO., AR
EXP. 5/9/2000

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. CIV 92-1075

DR. STEVEN C. SCHUELLER, M. D.

PLAINTIFF

v.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; DR. C.E. RIPLEY, DR. D.L. TOON; DR. B.J. WALSH; JOHN DOE #1; and JOHN DOE #2

DEFENDANTS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, all defendants in this action jointly move the Court to enter summary judgment dismissing all of plaintiff's claims. As grounds for this motion, defendants state that there is no genuine issue of material fact, and defendants are entitled to judgment as a matter of law, for the following reasons:

- plaintiff's claims are barred by the doctrines of collateral estoppel, issue preclusion and res judicata;

- plaintiff's claims are barred by the Health Care Quality Improvement Act of 1986, 42 U.S. § 11101, *et seq.*

- plaintiff's Sherman Act claims are barred by the statute of limitations, 15 U.S.C. § 15b;

- plaintiff's claims are barred by laches;

- plaintiff fails to state claims against the members of the Crossett Health Foundation;

- the Health Care Quality Improvement Act does not contain an independent private right of action;

- plaintiff's Sherman Act claims fail on the merits because there is no injury to competition.

In support of this motion, defendants submit the accompanying Statement of Undisputed Material Facts and brief.

WHEREFORE, defendants jointly request the Court to enter an order dismissing this action on summary judgment, and for all other just and proper relief.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD

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320 West Capitol Avenue, Suite 1000
Little Rock, Arkansas 72201

By s/ Stuart P. Miller
Stuart P. Miller

and

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
200 West Capitol Avenue
Little Rock, Arkansas 72201-3699
(501) 371-0808

By s/ Charles L. Schlumberger
Edwin L. Lowther, Jr. (81107)
Charles L. Shlumberger (79253)
Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. CIV 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

v.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; DR. C.E. RIPLEY, DR. D.L. TOON; DR. B.J. WALSH; JOHN DOE #1; and JOHN DOE #2

DEFENDANTS

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 29 of the Rules of the United States District Court, Western District of Arkansas, defendants Clair Norman, *et al.*, state that for purposes of defendants' motion for summary judgment,[1] the following material facts are not in dispute, and are the only facts relevant to the disposition of this action:

1. The material facts set forth herein are assumed as true by defendants *solely* for purposes of summary judgment. Certain allegations asserted by plaintiff are deemed in this statement to be true, so that the "facts" will be reviewed in the light most favorable to plaintiff. In the event that summary judgment is denied, in whole or in part, defendants reserve the right to dispute all facts recited herein.

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1. Plaintiff Steven C. Schueller is a board-certified general surgeon. At all times relevant to this litigation, he did not engage in the practice of family medicine.

2. Defendants Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings and Roosevelt Early are members of the Crossett Health Foundation. None is a medical doctor.

3. Defendant Ashley Memorial Hospital ("AMH") is a primary care hospital facility in Crossett, Arkansas. It services a circular geographic area within a 25-mile radius of Crossett. No other hospitals are located within the geographic market serviced by AMH. Further, the limited demand for services provided by AMH in the geographic market, the capital cost of constructing and equipping, and the licensing and regulatory procedures associated with constructing, a competing hospital in the relevant geographic market served by AMH render an alternative facility a virtual impossibility.

4. Defendants Dr. F.N. Burt, Dr. E.A. Gresham, Dr. L.F. Garcia, Dr. J.D. Rankin, Dr. C.E. Ripley (deceased), Dr. D.L. Toon, and Dr. B.J. Walsh all practice (or, at relevant times, practiced) family medicine or general medicine in Ashley County, Arkansas. None is board-certified in general surgery, nor was engaged in the practice of general surgery at any time relevant to this lawsuit.

5. Defendant Dr. T. Birriel is a general surgeon who was granted staff privileges at AMH in 1989.

6. In April 1983, pursuant to a written agreement, Dr. Schueller was granted privileges to practice general surgery at AMH.

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7. At the time Dr. Schueller began practicing general surgery at Ashley Memorial Hospital, the defendant physicians on

* * *

16. On May 20, 1991, an Ad Hoc Committee of the AMH Active Medical Staff met to consider eleven allegations of possible disruptive conduct by Dr. Schueller which might potentially adversely affect patient care. Dr. Schueller attended a portion of that hearing.

17. In June, 1991, the Medical Staff adopted the findings of the Ad Hoc Committee and recommended to the Board of Governors that Dr. Schueller be reprimanded for conducting an unauthorized and inaccurate peer review, and making an unauthorized public disclosure of patients' names. The AMH Board of Governors approved the Medical Staff's recommendations, and further admonished Dr. Schueller to cooperate more closely with the staff and board, be less divisive in his behavior, and follow staff guidelines for emergency room duties. Dr. Schueller was advised of this reprimand by a June 19, 1991 letter from Steve McAdams, chairman of the AMH Board of Governors.

18. On August 6, 1991, Dr. Schueller and Dr. Garcia had an altercation in AMH that stemmed from Dr. Garcia's removal of beehives owned by Dr. Schueller from Dr. Garcia's premises. As a result, Dr. Schueller and Dr. Garcia swore out arrest warrants against each other with the Crossett Police Department.

19. On August 7, 1991, Dr. Toon as chief of staff of the hospital and Mr. Bartlett, administrator, sent Dr. Schueller a letter

advising him that his staff privileges at AMH had been summarily suspended.

20. On August 12, 1991, the Medical Staff, at a specially called meeting, voted to recommend to the Board of Governors that Dr. Schueller's clinical privileges be revoked.

21. On or about August 14, 1991, Dr. Schueller requested a hearing before the Executive Committee of the AMH medical staff to review his summary suspension.

22. On August 28, 1991, the Medical Staff voted to recommend a continuation of Dr. Schueller's suspension. On that same date, Mr. Bartlett mailed a letter to Dr. Schueller advising him of this action, and of his right to a hearing. On September 3, 1991, Dr. Schueller requested the hearing.

23. On September 20, 1991, pursuant to notice to Dr. Schueller, the Ad Hoc Committee of the Medical Staff met to address six charges of improper conduct and disruptive behavior brought against Dr. Schueller. Dr. Schueller was in attendance during a portion of that meeting. Subsequent to that hearing, the Ad Hoc Committee voted to recommend to the Medical Staff that it continue the summary suspension and revocation of Dr. Schueller's clinical privileges. The Medical Staff subsequently adopted these recommendations, and referred the recommendations to the Board of Governors.

24. On December 16, 1991, the Board of Governors at AMH conducted a hearing to consider whether Dr. Schueller's privileges should be revoked. Dr. Schueller appeared with counsel at that hearing. At the completion of the hearing, the Board of Governors voted to revoke Dr. Schueller's clinical privileges.

* * *

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL, M.D.; DR. F.N. BURT, M.D.; DR. E.A. GRESHAM, M.D.; DR. L.F. GARVIA, M.D.; DR. J.D. RANKIN, M.D.; DR. C.E. RIPLEY, MD.; DR. D.L. TOON, M.D.; DR. B.J.WALSH, M.D.; JOHN DOE #1: AND JOHN DOE #2

DEFENDANTS

DEPOSITION OF

DR. BENJAMIN J. WALSH

* * * * *

APPEARANCES:

On Behalf of Plaintiff:
Morgan E. Welch, Esquire
Attorney at Law
P.O. Drawer 3685
Little Rock, Arkansas 72203

Appendix G

On Behalf of Defendants:
Edwin Lowther, Jr., Esquire
Attorney at Law
2200 Worthen Bank Building
200 West Capitol
Little Rock, Ark. 72201

Stuart Miller, Esquire
Attorney at Law
1000 Savers Federal Bldg.
Little Rock, Ark 72201

Crossett, Arkansas
July 28, 1993

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* * *

[16] surgery?

A There may have been instances where an out of town physician might have come in to surgery.

Q On a one shot basis?

A So to speak.

Q Do you have any out of town physicians who do consistent cesarean section surgery here?

A No.

Q Who would be the out of town surgeon that comes to mind?

A Dr. Ziegler in Bastrop.

Q In Bastrop?

A Yes.

Q How many cases has he handled here?

A I don't know.

Q Can you remember more than one or two?

A Yes. More than one or two.

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Q During what period of time?

A During this time period.

Q 1983 to '91 or '92?

A Yes, sir.

Q If you were to quantify the amount of cesarean sections you do at this hospital as opposed to other people, would it be fair to say you do 90 percent of the cesareans here or you did during this period of time?

A Yes, sir.

* * *

Appendix G

SPECIAL REPORTS

SPECIAL CALLED MEETING OF
THE ASHLEY MEMORIAL BOARD OF GOVERNORS
MONDAY, DECEMBER 16, 1991
7:30PM-AMH Board Room

Present: Steve McAdams
Herman Hamilton
Dr. Ben Walsh
Dr. Toon, C.O.S.
Moses Thomas
Dr. Doug Phillips
Rev. Broomfield

Also Present: Bert Jordan, Ex-Officio Member; Dennis Shackelford, Attorney; Thomas Bartlett, Administrator; Nancy Everitt, Administrative Assistant.

I. *Call to Order:*

Mr. McAdams called the meeting to order and noted that a quorum was present.

II. *Purpose:*

Mr. McAdams stated that the purpose of this meeting was to take action in regard to Dr. Schueller and that the matters before the Board of Governors of Ashley Memorial Hospital were:

> The recommendation of the Medical Staff on August 12, 1991, and of the Ad Hoc Committee of the Metical Staff on September 20, 1991, to revoke the clinical priviledges of Steven C. Schueller; and

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>The recommendation of the Executive Committee of the Medical Staff on August 28, 1991, and of the Ad Hoc Committee of the Medical Staff on September 20, 1991, to continue the summary suspension of the clinical priviledges of Dr. Steven C. Schueller.

It was moved by Dr. Phillips and seconded by Dr. Walsh that the Board of Governor of Ashley Memorial Hospital after having constituted itself as the hearing committee and having reviewed the record made of the hearing on November 19, 1991, make the following final decisions:

First, that the recommendation of the Medical Staff on August 12, 1991, and of the Ad Hoc Committee of the Medical Staff on September 20, 1991, to revoke the clinical priviledges of Dr. Steven C. Schueller, be confirmed:

Second, that the recommendation of the Executive Committee of the Medical Staff on August 28, 1991, and of the Ad Hoc Committee of the Medical Staff on September 20, 1991, to continue the summary suspension of the clinical priviledges of Dr. Steven C. Schueller be confirmed.

Discussion: >Mr. Hamilton stated that ample justification had been provided and asked that the Board support the Medical Staff's recommentations and not allow Dr. Schueller to continue to practice in the hospital.

The chair called for the question.

>Motion carried unanimously.The chair stated that had he voted he would have also supported the motion.

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III. *Adjourn*

There being no further business, the meeting as adjourned at 8:41PM.

s/ Steve McAdams
Steve McAdams, Chairman

Appendix G

SPECIAL REPORTS

A Special Called Meeting of the Ashley Memorial Hospital Medical Staff was held Monday, August 12, 1991 at 7:00 P.M. in the Board Room of Ashley Memorial Hospital.

The following members of the active staff were present*:

Dr. D. L. Toon	Dr. E. A. Gresham
Dr. Tomas Birriel	Dr. B. J. Walsh
Dr. F. N. Burt	

*attendance represents a majority of the active medical staff membership.

Also attending: Mr. Thomas G. Bartlett, Administrator; Linda Davis, Administrative Assistant.

I. Meeting called to order by Dr. Toon, Chief of Staff.

II. Purpose of meeting: To receive the Medical Staff Executive Committee's report RE

1) Dr. Luis Garcia's letter to the Chief of Staff and Hospital Administrator regarding his summary suspension. Dr. Garcia requested that the suspension be reviewed by the Executive Committee of the Medical Staff and that he be reinstated with full privileges as he feels Dr. Schueller's attack against him was completely without provocation.

Following discussion regarding Dr. Garcia's letters, the altercation between Dr. Garcia and Dr. Schueller, and copies of the statements from AMH employees, a motion was duly

made and second to recommend that Dr. Garcia's suspension be lifted. Motion carried unanimously by the Executive Committee.

2) Letter from Steve McAdams, Chairman of the Hospital Board to Dr. D. L. Toon, Chief of Staff requesting the Medical Staff's review of the letter written by Dr. Schueller to the JCAHO. In specific to answer the following questions:

Question #1: Does the Medical Staff view this letter as disruptive behavior? The Executive Committee answered yes.

Question #2: Has the case of the 21 y/o patient mentioned within the letter been reviewed and if so what were the findings? If not, why not?

* * *

gain discussed at the 3/12/91 monthly medical staff meeting and another vote was taken which supported the original vote.

It was further noted by the Executive Committee that under the present hospital bylaws, the Board of Governors does have the right to change the medical staff bylaws unilaterally.

Also, it was pointed out that what Dr. Schueller is referring to RE ER Call is in the Medical Staff Rules & Regulations, not the Medical Staff Bylaws.

Following the report of the Executive Committee as presented by Dr. Toon, the following motions were duly made and approved:

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1. That Dr. Luis Garcia's summary suspension be lifted immediately. (Motion made by Dr. Burt, second by Dr. Birriel, carried by unanimous vote.)

2. For the Medical Staff to go on record as totally/completely supporting the findings/report of the Executive Committee as presented. (Motion made by Dr. Gresham, second by Dr. Burt, carried by unanimous vote.)

3. That based upon the following conduct by Dr. Steven Schueller:

   1) his letter of May 14, 1991 to the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) which constitutes disruptive behavior and a violation of the admonitions contained in the letter of reprimand dated June 19, 1991.

   2) his not being located while on emergency room call on May 20, 1991.

   3) his conduct in the hospital on August 6, 1991 involving an altercation between himself and Dr. Luis Garcia.

   4) his two (2) appearances in the hospital with a video camera videotaping in a disruptive and offensive manner.

   5) his attempts to adversely affect physician recruitment.

   6) his other numerous episodes of disruptive behavior.

the Medical Staff recommend to the Board of Governors revocation of his clinical privileges. Such revocation does not

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prohibit Dr. Schueller requesting the Executive Committee of the Staff to hold a hearing on his summary suspension provided in the Bylaws. (Motion made by Dr. Walsh, second by Dr. Gresham. Carried by unanimous vote.)

III. Dr. Garcia/Dr. Schueller ER Coverage: discussed, arrangements made by Medical Staff to cover the emergency room.

There being no further business, meeting adjourned at 8:20 P.M.

s/ D. L. Toon, M.D.
D. L. Toon, M.D., Chief of Staff

Appendix G

SPECIAL REPORTS

AMH Medical Staff Executive Committee Meeting
Thursday, August 22, 1991
7:00 A.M. - AMH Board Room

Present: Dr. D. L. Toon
Dr. Tomas Birriel
Dr. F. N. Burt
Mr. Tommy Bartlett

Purpose of Meeting: Dr. Steven C. Schueller's request for a hearing concerning his summary suspension.

Meeting called to order.

Letter received 8/15/91 from Dr. Schueller requesting a hearing to consider lifting his suspension of hospital privileges. A certified return receipt requested letter was mailed to Dr. Schueller from Chief of Staff. Having no evidence that Dr. Schueller received notice of the hearing, the meeting was adourned to be rescheduled Wednesday, August 28th @ 7:00 A.M. in the AMH board room.

D. L. Toon, M.D. Chief of Staff

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SPECIAL REPORTS

Medical Staff Executive Committee Meeting
Wednesday, August 28, 1991
7:00 A.M. - AMH Board Room

Present: Dr. D. L. Toon
Dr. Tomas Birriel
Dr. F. N. Burt
Mr. Thomas G. Bartlett, Administrator
Dr. Steven C. Schueller
Linda Davis, Administrative Assistant

Dr. Toon stated that Dr. Schueller received a summary suspension dated August 7, 1991 and he wrote a letter requesting a review of that suspension and that is the reason for the meeting this date. The meeting was originally scheduled for August 22, 1991 but Dr. Schueller was out of town and that meeting was cancelled to today's meeting.

Dr. Toon called the meeting to order and asked Dr. Schueller to respond concerning the summary suspension.

Dr. Schueller asked, what is the charge against me? It was reported to Dr. Schueller the review was due to an altercation between Dr. Schueller and Dr. Garcia, and it had to do with the violation of the admonition of the Board's reprimand which caused a disruption of hospital operations to have an adverse affect upon patient care.

Dr. Schueller refused to offer a reply concerning the summary suspension and left the meeting at 7:15 A.M.

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The Executive Committee of the Medical Staff, based upon their review, made a motion to recommend to continue the summary suspension of Dr. Steven Schueller. The motion passed unanimously.

Meeting adjourned.

s/ Dr. D. L. Toon, M.D.
Dr. D. L. Toon, M.D.
Chief of Staff

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SPECIAL REPORTS

ASLEY MEMORIAL HOSPITAL
AD HOC COMMITTEE MEETING
Tuesday, September 10, 1991

The Ashley Memorial Hospital Ad Hoc Commlttee met TUESDAY, SEPTEMBER 10, 1991 immediately following the regular monthly meeting of the Medical Staff in the hospital board room.

Dr. Rankin, Chairman of the Ad Hoc Committee met with:

Dr. Burt, Vice-Chairman
Dr. Walsh
Dr. Gresham,
Dr. Thompson
Dr. Garcia
Dr. Toon
Dr. Birriel
Dr. Ripley

It was decided to postpone the scheduling of the hearing on the summary syspension so that the proper documentation and reference material can be gathered and to comply with Dr. Schueller's request to have the hearing regarding his suspension and revocation of his clinical privileges be combined.

s/ Dr. J.D. Rankin
Dr. J.D. Rankin, Chairman

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SPECIAL REPORTS

* * *

The regular monthly meeting of the Ashley Memorial Hospital Medical Staff was held TUESDAY, OCTOBER 8, 1991, at 7:00pm in the hospital board room.

The following members were present:

Dr. D.L. Toon, COS
Dr. Tomas Birriel
Dr. E.A. Gresham
Dr. Luis Garcia
Dr. Barry Thompson
Dr. F.N. Burt
Dr. Ben Walsh

also attending were: Tommy Bartlett, Administrator; Nancy Tucker, Director of Nurses; and Nancy Everitt, Administrative Assistant.

I. *Call to Order*: Dr. Toon, COS called the meeting to order.

Mr. Bartlett, Mr. Arnold and Dr. Gresham traveled to Chicago to discuss Dr. Schueller's letter to the Joint Commission.

VII. *Ad-Hoc Committee Report*: Dr. Toon reviewed the Ad Hoc Committee Report in reference to Dr. Steven Schueller (attached) in its entirety. Upon review of this report a motion was made and properly seconded to approve the Ad Hoc Committee Report. The vote was unanimous with one abstention.

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IN THE UNITED STATES DISTRICT COURT
WESTERNDISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL, M.D.; DR. F.N. BURT, M.D.; DR. E.A. GRESHAM, M.D.; DR. L.F. GARVIA, M.D.; DR. J.D. RANKIN, M.D.; DR. C.E. RIPLEY, MD.: DR. D.L. TOON, M.D.; DR. B.J.WALSH, M.D.; JOHN DOE #1: AND JOHN DOE # 2

DEFENDANTS

DEPOSITION OF

DR. DON L. TOON

* * * * *

APPEARANCES:

On Behalf of Plaintiff:
Morgan E. Welch, Esquire
Attorney at Law
P.O. Drawer 3685
Little Rock, Arkansas 72203

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On Behalf of Defendants:
Edwin Lowther, Jr., Esquire
Attorney at Law
2200 Worthen Bank Building
200 West Capitol
Little Rock, Ark. 72201

Stuart Miller, Esquire
Attorney at Law
1000 Savers Federal Bldg
Little Rock, Ark 72201

Crossett, Arkansas
July 28, 1993

* * *

[25] Busby.

Q Do I understand your answer to be that you don't know why you would have fallen off of your referrals to Dr. Schueller, assuming that the chart is correct?

A Assuming the chart is correct I don't know why the number of referrals from me decreased that much.

Q Other than Dr. Walsh and Dr. Gresham and we've talked about cesarean section surgery and Dr. Schueller and Dr. Birrell after he got here, who else did any kind of surgery at Ashley Memorial on staff, on active staff?

A Your beginning date would be when?

Q 1983 to '91 or '92.

A Dr. Toon; Dr. Ripley; Dr. Salb; Dr. Rankins; Dr. Burt.

Q What kind of procedures did you do for instance?

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A Primarily the less high risk procedures such as D & C's. Things of that nature.

Q Would you defer to a general surgeon for high risk procedures?

A Yes, sir.

Q Except I suppose in the case of cesarean?

A I did not do cesareans during that period of time.

Q I understand that, but you did have patients that went to Dr. Walsh, didn't you?

A Yes, I did.

MR. LOWTHER: Wait a second. I want to make sure we're

* * *

[61] A I wouldn't agree with you on that point.

Q Please explain to me which ones of these involve malpractice.

A Number (2) might be construed to involve his practice in some way.

Q And that was the day that the police officer went to an address and said that he couldn't locate Dr. Schueller?

A That is correct.

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Q It was pointed out to you that wasn't Dr. Schueller's was it?

A I don't remember that part of it. I do however remember that they wasn't sure. There was some controversy as to what the address he went to was.

Q And that was the one where there was a question about whether Dr. Schueller could be reached and whether or not his answering machine was working, and you observed did you not, Doctor, that his explanation was understandable and could have happened to anybody?

A I refused to take any action because in my opinion it could have been an honest mistake. I wrote a letter to that effect, I believe.

Q What other episode of these six involved malpractice?

A None in my opinion.

Q Thank you. Doctor, do you have any criticism of Dr. Schueller's technical ability as a surgeon?

[62] A I do not.

Q Do you find that he is a competent general surgeon?

A In my opinion he is.

Q Doctor, that is all the questions I have at this time. I would tell you that there was a request for some documents which the magistrate has ruled on and are on appeal to the district judge and

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I will have to ask to reserve the right to further depose you if the court rules in my favor on those documents, and if it does the only representation I'll make to you is I won't ask you these same questions again. With that I have no further questions.

MR. MILLER: No questions.

MR. LOWTHER: No questions at this time.

(Signature Reserved)

(Wherefore, said deposition was concluded in this matter.)

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, ET AL.

DEFENDANTS

AFFIDAVIT OF DR. CHARLES VENUS

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

The undersigned, Dr. Charles Edward Venus, having been duly sworn on oath, states as follows:

1) My name is Dr. Charles Venus, Ph.D.. I am a consulting economist. A copy of my Curriculum Vitae is attached to my Affidavit.

2) I have reviewed the Plaintiff's Counterstatement of Material Facts and Issues to be Tried. I have reviewed other documents and am generally familiar with the terms of "market" and "services" as articulated in Plaintiff's antitrust action.

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3) I have, based upon my review of all materials and documents submitted me to date, arrived at the following opinions:

a) The medical services offered by the defendants, Burt, Gresham, Garcia, Rankin, Ripley, Toon, and Walsh, would be considered by buyers to be alternatives for the services of each other. That is to say, one physician's services in this group is a substitute for those of another. From my review of the documents submitted, the depositions and of the Affidavit of Dr. Schueller, these individuals are in direct economic competition with Dr. Schueller. Dr. Schueller has engaged in the general practice of medicine from the descriptions of the parties.

b) Dr. Walsh is also in direct economic competition with Dr. Schueller because of Dr. Walsh's participation in general surgery as defined by Dr. Toon in his deposition consisting of "90% of the cesarean sections" at the Ashley Memorial Hospital. Dr. Birriel is in direct economic competition with Dr. Schueller because Dr. Birriel engages in a general surgical practice.

c) I have concluded from my review that there exits ample evidence of a collective boycott of Dr. Schueller by these competitors.

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d) From my review of the documents and facts supplied thus far I have concluded that the collective boycott aforementioned results in direct economic harm to consumers in the relevant market which involves interstate commerce

e) The relevant market is reasonably well-defined, both within the previous study commissioned by the Hospital, and by the Statements of Fact by all the parties submitting pleadings to the Court.

f) The Plaintiff's first two years at AMH in 1983 and 1984 show that he performed 450 surgical cases during that period of time, increasing his surgical load from 203 in 1983 to 247 in 1984. This constituted an increase of 22%, year over year.

g) My review of the subsequent course in which Dr. Schueller found himself, however, is reflective of concerted action. In short, after 1985, a year in which the record shows a "plan" was announced by the hospital administrator with reference to Dr. Schueller, his surgical cases and referrals fell off 95% from 1985 to 1990. I find this to be more than merely statistically significant; it appears to me to be indicative of the exercise of power and of a collective action to boycott Dr. Schueller.

FURTHER, THE AFFIANT SAYETH NOT.

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VERIFICATION

I, CHARLES EDWARD VENUS, state upon oath that the foregoing facts and information are true and correct to the best of my knowledge and belief.

s/ Charles Edward Venus
CHARLES EDWARD VENUS

November 9, 1993
DATE

SUBSCRIBED and SWORN to before me, the undersigned Notary Public, this 9th day of November, 1993.

s/ Mary C. Kitchen
NOTARY PUBLIC

My Commission Expires:
10-8-2000

[Stamped]
NOTARY PUBLIC
MARY C. KITCHEN
PULASKI COUNTY, AR

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSA
EL DORADO DIVISION

NO. 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, AND ROOSEVELT EARLY, TRUSTEES OF CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. T. BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. L.F. GARCIA; DR. J.D. RANKIN; DR. C.E. RIPLEY; DR. D.L. TOON; DR. B.J. WALSH; JOHN DOE #l; AND JOHN DOE #2

DEFENDANTS

OBJECTIONS AND RESPONSES TO PLAINTIFF'S THIRD SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Come Defendants, Clair Norman, Herman Hamilton, Jr., William S. Arnold, Ned Hastings, and Roosevelt Early, Trustees of Crossett Health Foundation; Ashley Memorial Hospital; Dr. T. Birriel; Dr. F.N. Burt; and Dr. J.D. Rankin, by and through their attorneys, Mitchell, Williams, Selig, Gates & Woodyard, and for their Objections and Responses to Plaintiff's Third Set of Interrogatories and Requests for Production of Documents, state as follows:

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GENERAL OBJECTIONS

This response is made solely for the purpose of this action. Each response is subject to all objections as to confidence, privilege, relevance, materiality, and admissibility, and any and all other objections and grounds that would require

* * *

RESPONSE TO INTERROGATORY NO. 1: (a) George Rodman, (May, 1982 - August, 1983), Robert Fitzgerald, August, 1983 - October, 1983); (b-c) Norman K. Reynolds (November, 1983 - April, 1986), Robert Fitzgerald (April, 1986 - September, 1986), Mark Hoenemeyer (HCA) (October, 1986), Charles E. Sons, Jr. (HCA) (November, 1986), Mark Hoenemeyer (HCA) (December, 1986), Steve Reeder (HCA/Quorum) (January, 1987 - June, 1990), Ward Stevens (Quorum) (July, 1990), James L. Watters (Quorum) (August, 1990 -January, 1991), and Thomas G. Bartlett, III (Quorum) (February, 1991 - present).

Ashley Memorial Hospital was managed by Warner Brown Services during 1983 - 1986. Beginning in 1986, Ashley Memorial Hospital was managed by HCA Management Company. The organization became independent of HCA on 8/1/89, and stayed under the name of HCA until 1990 when the name was changed to Quorum Health Resources, Inc.

INTERROGATORY NO. 2: Please list each and every insurance policy/policies of the defendant(s), and policy limits, which in the event the plaintiff is successful in recovery, might arguably be obligated to pay a judgment.

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RESPONSE TO INTERROGATORY NO. 2: See Resp__ Request for Production No. 1. Providing the policy information in no manner should be interpreted to indicate that such coverage, if any, exists in this case.

* * *

INTERROGATORY NO. 8: If you have asserted in your Answer that Plaintiff has lack of standing to bring this action, please set forth your good faith reason for this assertion.

RESPONSE TO INTERROGATORY NO. 8: See Objection to Interrogatory No. 6. Without waiving such objection, Defendants anticipate that they will be filing motions which more fully explain their position on the legal issues in this case.

INTERROGATORY NO. 9: If you have disputed jurisdiction and venue in your Answer, please set forth your good faith reason for this dispute.

RESPONSE TO INTERROGATORY NO. 9: See Objections and Responses to Interrogatory No. 6 and Interrogatory No. 8.

INTERROGATORY NO. 10: If you have asserted in your Answer that Plaintiff's claim is barred against certain defendants, please set forth the reason for this assertion.

RESPONSE TO INTERROGATORY NO. 10: See Objections and Responses to Interrogatory No. 6 and Interrogatory No. 8.

Appendix G

Stuart P. Miller
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD
320 West Capitol Avenue,
Suite 1000
Little Rock, Arkansas 72201
(501) 688-8800

By s/ Stuart P. Miller
Stuart P. Miller
Bar I.D. No. 88137

Appendix G

ARTICLE IX

Hearing and Review

Section 1. Right to Hearing and to Review

a. When any practitioner receives notice of a recommendation of the medical staff that, if ratified by decision of the board, will adversely affect his appointment to or status as a member of the organized medical staff or his exercise of clinical privileges, he shall be entitled to a hearing before an adhoc committee of the organized medical staff. If the recommendation of the medical staff following such hearing is still adverse to the affected practitioner, he shall then be entitled to review by the board before the board makes a final decision on the matter.

b. When any practitioner receives notice of a proposed decision by the board that will adversely affect his appointment, to or status as a member of the staff or his exercise of clinical privileges, unless he was entitled to a hearing prior to the decision by the medical staff and waived such right, he shall be entitled to a hearing by the board or by a review committee appointed by the board.

Section 2. Request for and Waiver of Hearing.

a. The chief executive officer shall be responsible for giving written notice (within one (1) working day) of an adverse recommendation, decision, or proposed decision, to any affected practitioner who is entitled to a hearing or to review by certified mail, return receipt requested.

b. The failure of a practitioner to request a hearing to which he is

entitled by these bylaws within seven (7) days in the manner herein provided, or his failure to attend a requested hearing after notice of the hearing, is a waiver of his right to such hearing and to any subsequent review to which he is entitled by these bylaws.

c. When the waived hearing or review relates to an adverse recommendation of the organized medical staff or of a hearing committee appointed by the board, the recommendation shall then become and remain effective against the practitioner pending the board's final decision on the matter. Upon final decision of the board, the chief executive officer shall, within one (1) working day, notify the affected practitioner of his status by certified mail, return receipt requested.

d. A notice of right to hearing shall be considered given when mailed as herein provided addressed to the last address of record with the hospital. A request for hearing must be mailed addressed to the chief executive officer within the same time herein stated.

Section 3. Notice of Hearing.

a. Within seven (7) days after receipt of a request for hearing from a practitioner entitled to the same, the medical staff or the board, whichever is appropriate, shall schedule and arrange for such a hearing and shall through the chief executive officer, notify the practitioner of the time, place, and date so scheduled, by certified mail return receipt requested. The hearing date shall be not less than seven (7) days nor more than thirty (30) days from the date of receipt of the request for hearing; provided, however, that a hearing for a practitioner who is under suspension which is then in effect shall be held as soon as arrangements may reasonably be made, but not later than ten (10) working days from the date of receipt of such practitioner's request for hearing.

b. The notice of hearing shall state in concise language the acts or omissions with which the practitioner is charged, a list of specific or representative charts being questioned, and/or the other reasons or subject matter that was considered in making the adverse recommendation or decision.

Section 4. Composition of Hearing Committee.

a. When a hearing relates to a proposed adverse decision of the board of medical staff, the board or medical staff, may constitute itself as the hearing committee or may appoint a hearing committee to conduct a hearing and shall designate one of the members of this committee as chairman.

Section 5. Conduct of Hearing.

a. There shall be at least a majority of the members of the hearing committee present when the hearing takes place, and no member may vote by proxy.

b. An accurate record of the hearing must be kept. The mechanism shall be established by the adhoc hearing committee, and may be accomplished by use of a court reporter, electronic recording unit, detailed transcription, or by the taking of adequate minutes.

c. The personal presence of the practitioner for whom the hearing has been scheduled is required. A practitioner who fails without good cause to appear and proceed at this hearing shall be considered to have waived his rights as provided in paragraph 2 b. of this Article IX and to have accepted the adverse recommendation or decision involved, and the same recommendation or decision shall become and remain in effect as provided in paragraph 2 b.

d. Postponement of hearing beyond the time set forth in these bylaws shall be made only with the approval of the hearing committee. Granting of such postponements shall only be for good cause shown and in the sole discretion of the hearing committee.

e. The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing or by a member of his local professional society.

f. The appointing authority may appoint a hearing officer and if one is appointed, or the chairman of the hearing committee or his designee if one is not appointed, shall preside over the hearing to determine the order of procedure during the hearing, to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence, and to maintain decorum.

g. The hearing need not be conducted strictly according to rules or law relating to the examination of witnesses or presentation of evidence. Any relevant matter upon which responsible persons customarily rely in the conduct of serious affairs shall be considered, regardless of the existence of any common law or statutory rule which might make evidence inadmissible over objection in civil or criminal action. The practitioner for whom the hearing is being held shall, prior to or during the hearing, be entitled to submit memoranda concerning any issue of procedure or of fact and such memoranda shall become a part of the hearing record.

h. The medical staff when its action has prompted the hearing, shall appoint one of its members or some other medical staff

member to represent it at the hearing, to present the facts in support of its adverse recommendation, and to examine witnesses. The board, when its action has prompted the hearing, shall appoint one of its members to represent it at the hearing, to present the facts in support of its adverse decision and to examine the witnesses. It shall be the obligation of such representative to present appropriate evidence in support of the adverse recommendation or decision, but the affected practitioner shall then be responsible for supporting his challenge to the adverse recommendation or decision by providing appropriate evidence showing that the charges or grounds involved lack any factual basis or that such basis or any action based upon them is either arbitrary, unreasonable or capricious.

i. The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness on any matter relevant to the issue of the hearing, and to rebut any evidence. If the practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination.

j. The hearings provided for in these bylaws are for the purpose of resolving, on an intraprofessional basis, matters bearing on professional competency and conduct. Accordingly, neither the affected practitioner nor the organized medical staff or the board, shall be represented at any phase of the hearing procedure by an attorney-at-law unless the hearing committee, in its discretion, permits both sides to be represented by counsel. This is not intended to deprive the practitioner, the medical staff, or the board of the right to legal counsel in connection with preparation for the hearing or for a possible appeal; and, it a hearing officer is utilized, he may be an attorney-at-law.

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k. The hearing committee may, without special notice, recess the hearing and ten reconvene the same for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon conclusion of the presentation of oral and written evidence, the hearing will be closed. The hearing committee may then, at a time convenient to itself, conduct its deliberations outside the presence of the practitioner for whom the hearing was convened.

l. Within seven (7) days after final adjournment of the hearing, the hearing committee shall make a written report and recommendation, and shall forward the same together with the hearing record and all other documentation to the medical staff or the board, whichever appointed it. The report may recommend confirmation, modification, or rejection of the original adverse recommendation of the medical staff or proposed decision of the board.

m. The final decision of the medical staff and of the board as the case may be, shall be made within thirty (30) days of the receipt of the recommendation of the hearing committee and shall be communicated to the affected physicians as provided in Section 2 c. of this Article.

Appendix G

1991 MEDICAL STAFF

Active

T. Birriel, M.D., Vice-Chief of Staff
F. N. Burt, M.D., Past Chief of Staff
L. F. Garcia, M.D.
E. A. Gresham, M.D.
J. D. Rankin, M.D.
S. C. Schueller, M.D.
B. V. Thompson, M.D.
D. L. Toon, M.D., Chief of Staff
B. J. Walsh, M.D.

Courtesy

C. E. Ripley, M.D.
R. L. Salb, M.D.

Consulting

P. Coyle, M.D.
B. Dougherty, M.D.
W. Elliott, M.D.
W. R. Scurlock, M.D.
J. Giller, M.D.
J. Callaway, M.D.
B. Stage, M.D.
J. Cooksey, M.D.
P. Perry, M.D.
R. Pillsbury, M.D.
R. Nichols, M.D.
J. Ziegler, M.D.

Appendix G

Dental

M. McDaniels, D.D.S.
D. B. Phillips, D.D.S.

Appendix G

[2] HEARING AT THE BOARD ROOM OF ASHLEY MEMORIAL HOSPITAL

SEPTEMBER 20, 1991

Present were: Dr. Rankin, Dr. Birriel, Dr. Gresham, Dr. Walsh, Dr. Burt, and Dr. Schueller.

Produced, sworn and examined, pursuant to agreement, at the Ashley Memorial Hospital, Crossett, Arkansas, commencing at 7:00 A.M. on September 20, 1991, in the above-entitled cause.

* * * * * *

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(All questions by examiner, Dr. Rankin, are indicated by (Q).

(All answers by respondent, Dr. Schueller, are indicated by (A).

* * *

[9] A Can you please, Dr. Burt, tell me what actions I'm explaining?

Q Your actions on August 6, between you and Dr. Garcia?

A What action was that? What am I to respond to?

Q The altercation between you that disrupted the people at the front desk on that date?

A Were you a witness?

Q No, I wasn't. I heard it, but I didn't see it.

A So, you were there and you heard something and you're sitting in judgment of me?

Q No, sir, that's what we're here for today.

A You were there?

Q I was there.

A You heard something?

Q I heard it but I didn't see it.

A Yes. You're a witness and now you sit here in judgment.

Q No, sir.

A This committee as I understand it recommends to the Board; is that not correct?

Q That's correct.

A I think it's inappropriate for a board member to be on this

committee reporting and advising the Board. You're essentially advising yourself. I don't think that's appropriate. There's a tremendous amount of conflict of interest here that are inappropriate for my rights.

* * *

[20] Q We'll go on to Item Number 2.

DR. BIRRIEL: I have a question out of curiosity. Names that you talk about in those letters or whatever letters before, those are names of patients that you obviously found or got or saw somewhere. Where did you get those names from for you to find out the names and the details? I'm just curious as to how you got that information?

A If you want to discuss those cases, get the charts.

DR. GRESHAM: We've already been through all that. We've already been through that with Dr. Schueller and the QA in other meetings when he's been present. I thought this meeting was to be where we read the charges to him and he answered them. I mean, we're going back through all this stuff we've been through before.

A I think what you're saying is you thought the meeting was that you just read the charges and I don't get a chance to respond to anything.

DR. GRESHAM: No. We'd read the charges and you were supposed to answer them, but you've been asking more questions than you've answered.

A I'm sorry if I asked for some procedural rights. I know you don't like those. You like to speak behind people's backs out in the ward. I'm sorry. It is more difficult to deal with someone who talks back, isn't it? It's much easier to deal with somebody when he's not present like on August 12,

* * *

[27] Q Disruptive behavior at the east wing on that day.

A And have you accused Dr. Garcia of the same thing?

Q I think he was.

A And that was resolved how?

Q I think there was a hearing on that.

A There was a hearing?

Q We're conducting your hearing now.

DR. BURT: There was a request made in writing by Dr. Garcia of the case to be reviewed and the case was reviewed and he was reinstated.

A And the mechanism in that for the By-Laws is what?

DR. BURT: It's all in there.

A All in what?

DR. BURT: It's all in there.

A I don't have the By-Laws memorized. I don't know which Article and which subscript it is. We followed the protocol and the By-Laws. He submitted a letter asking to be reinstated. The case was reviewed and his privileges were reinstated.

A And Dr. Garcia's testimony was what?

DR. WALSH: We're not here to talk about that.

DR. BURT: That's not what we're here for, Dr. Schueller.

DR. BIRRIER: We want to hear your side.

A You want me to respond to an altercation between me and [28] Dr. Garcia and you want to hear Dr. Garcia's — you want to incorporate Dr. Garcia's —

DR. BURT: Dr. Garcia made his statement without you being present. You weren't present when he made his statement.

A Yeah, which is inappropriate.

DR. BURT: No, it isn't. It's not at all inappropriate.

A Yes, it is.

DR. BURT: We asked his opinion of what happened. He gave it and we've asked you the same question and you don't —

A I have given you a very clear explanation. I did nothing. He just read some testimony and what did it say. That person didn't see anything that I did wrong.

DR. WALSH: I don't think it said that at all.

A What did it say I did wrong?

DR. WALSH: I just read it. I don't have to explain it.

A I think you do. What did that person say that I did improper?

DR. BIRRIEL: It's only a statement. The only person that can explain that is the one that gave the statement.

A Well, Doctor, I've been suspended. What was the reason for the suspension?

DR. BIRRIEL: Originally, the altercation that you had. Are you going to say — You said that you're blameless. You said that whatever happened there, there's nothing wrong with what you did: am I correct?

* * *

[38] discussed anything of the sort with Dr. Triplett. I've never met Dr. Triplett. I've had no contact with Dr. Triplett about recruitment in any way shape or form.

DR. GRESHAM: We do have somebody that can testify that he did, don't we?

A Well, I think you ought to present that person right now.

DR. GRESHAM: Maybe we'll present it later.

A I doubt it.

Q Have you ever advised any person not to come here for any type of practice?

A I have never spoken to a physician recruit ever. I have never known the name of a physician recruit. No physician recruit has ever been introduced to me. No physician recruit has ever had any contact with me about recruitment at all. I wouldn't even know if I was talking to them.

Q Have you ever written a letter to any physician stating that they should not come here?

A No, I have not. I will state it again. I have had no contacts, none, good or bad with any physician recruit ever. This is the second time that this hospital has accused me of interferring with recruitment and each time it has been false, and it is clear by now that the administration would like to blame me for their own failures. I would suggest to you that if you're having trouble with recruits that it may be because you didn't have them contact me. Because you know if a [39] recruit comes to town and he's introduced to a couple of people and he's not introduced to everybody on the staff, if he's got two brain cells that rub together, lights go off and bells ring, buzzers sound, and he says boy, there's something the matter here. They're covering something up.

DR. GRESHAM: Dr. Birriel, did you get a letter?

DR. BIRRIEL: I got a letter from Dr. Schueller sometime in 1989.

A Yes, after you'd agreed to come here in September of '88.

DR. BIRRIEL: That's correct.

A It was not a recruit. He was coming here. The letter was dated April 4th, and he came here in June. And what I wrote to him about was requesting his help in straightening out the anesthesia recoveries, which we didn't have at the time. Dr. Birriel indicated to me that he knew all about the damn anesthesia and he thought I was an objectional person and I've had no further dealings with him.

DR. WALSH: That was before you moved here?

DR. BIRRIEL: That was before I moved here.

Q Item #6: Other numerous episodes of disruptive behavior. Dr. Walsh, do you have any information on any other disruptive behavior?

DR. WALSH: I don't know that there's anything specific.

Q Dr. Schueller, do you have any other statements?

[40] A It's a typically absurd charge. It's so vague one cannot respond to it in any way, shape or form. I deny having ever done anything disruptive.

Q If you have no other statements, then we'll ask you to be excused while we go over these.

A I'm on my way.

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DR. SCHEUELLER LEFT AT THIS TIME.

Q While he's preparing to leave, I'll go ahead and read this so it'll be in the records: September, 1991, To Whom It May Concern: Dr. Triplett has stated to me that he has not received any communication from Dr. Schueller at any time. The only person who has been constantly in contact with him has been Dr. Gresham. Yours Truly, Barry Thompson.

DR. GRESHAM: And Dr. Triplett did sign a contract and he's coming the 1st of January.

Q The first item we need to address is the summary suspension of Dr. Schueller, the summary suspension by the Chiefs of Staff of his privileges as a practitioner and continued by the Executive Committee of the Medical Staff following the hearing on August 28, 1991. Is there any information on this other than what he has said?

DR. WALSH: About the altercation?

Q No. Well, we're addressing two items. The first one is The subject matter of the hearing is the summary suspension by the Chiefs of Staff of your clinical privileges as a

* * *

[60] DR. WALSH: I don't know. You'd have to ask him but those nurses were all talking about it in a buzz that morning when we came in on that day, whatever day it was, I don't remember, but that's the date I was given anyway. That may be off a day or two, but he didn't exactly deny he'd been here with a video

camera recording. Those kind of activities aren't real conducive to smooth care in a hospital and the operations of a hospital.

DR. BIRRIEL: It bothers me regarding something like this where he goes ahead and comes and does these kinds of things video taping for his own reasons and purposes; however, he just avoids the answer to the question all the time. I mean why would he do it. Simply he could have said regarding Dr. Garcia, it was to film him. Obviously he must have filmed other people or whatever, and if you go by the letter then did he ask the people could he film them or not or for what reason. He needs to give those reasons, so it's just a little bit too much.

DR. WALSH: We really didn't hear like Dr. Burt said, any testimony from him as to what happened or why it happened or his side of the story. We heard a bunch of questions rather than any answers or explanations for his actions.

Q Any other discussion of #4? Okay, Item #5, Your attempts to adversely affect physician recruitment. Do you have any information on that?

[61] DR. GRESHAM: Ben, you brought at one of the meetings that someone had been over to Dr. Thompson's office to talk to Dr. Triplett to try to — I think it was Doug Phillips to go over there and support him and tell him we're glad to have him in town. And that I guess Doug told you that Triplett said that Schueller had been by there and tried to —

DR. WALSH: Had been by there or tried to call him or talk to him, one or the other.

DR. GRESHAM: So, as far as the statement from Dr. Thompson, I'm not saying this statement is false, but it might be more worthwhile if you're going to admit that as evidence to talk with Dr. Triplett and see what happened. I mean, just to put down there that Dr. Gresham has contacted him many times doesn't necessarily mean that's adversely contacted him.

DR. WALSH: The fact that he sent a letter to Dr. Birriel even though he had signed a contract, he still had not moved here, was not living here, and to write a letter which said what?

DR. BIRRIEL: The one interesting thing is that from reading the letter even though he states that he knew that I had already signed a contract in September, which I'm sorry I don't remember when it was, but when I read his letter it makes me think that he doesn't know that. He says for me to ask for anything and everything before I come here because his experience has been that when I get here that they don't give [62] you anything, and also for me to be aware of anything for example that Mr. Hamilton says. It was just equating whatever he says to him, his son being a chiropractor which didn't make any sense. A few of the things he talks about, but the gist that I got was I'm telling you this so you don't come over here saying our administrator was not really the administrator, the administrator was somebody from out of town, Mr. Tom Barr. I mean for somebody who's not here yet and has a safe job as I had, I would have said this sounds really bad. So, you wonder and you question which I did and I called and still I got enough answers that I felt comfortable with and I felt like his letter was just sent to me so that I could change my mind and leave town. I signed a contract, yeah, and I don't remember the things he might remember because he knows the details about everything he does, but in my case I don't remember if there was any clause in the contract that if for one reason or another I

changed my mind before and have to pay some money. Maybe there was, I don't know, but for somebody who would want to come into practice as I had scheduled for me here because of many problems I would have paid whatever it was before getting into a hell hole. So, my perception which is what we're looking at as a physician being recruited for here and not physically here yet was that he just didn't want me to come here.

DR. GRESHAM: He also says without any doubt in his mind [63] that he has never met a recruit. Well, who can prove that and who can prove the other way. I do know when Terry Holt was being recruited down here, he made a couple of trips and he did talk to Dr. Schueller. Also, Mark Gabby who we were trying to recruit met him and said hi to him, and was introduced as a possible partner of ours. So there are recruits that he has known that were coming that he has been able to meet.

DR. BIRRIEL: I remember there was some other gentleman being recruited, if you will, or interviewed at the time that I was coming here, another surgeon from somewhere else, Oklahoma, or somewhere. I don't know if he didn't get to meet him or not. You might know.

Q Number Six, Your other numerous episodes of disruptive behavior. I think that's recorded on previous meetings even with Dr. Schueller. In fact, in a previous meeting we had a court reporter here these were documented. Now, in this discussion so far, the only one of the six that we really have some cause not to uphold is Item #2, not being located while on emergency room call. I think we can make a decision on the other five, based on the other five as to whether or not his revocation of clinical privileges will be upheld. Would anyone like to make a motion?

DR. GRESHAM: I move that we uphold the suspension of clinical privileges.

[64] Q Is there a second?

DR. BIRRIEL: Second.

Q This motion made and seconded to uphold the revocation of clinical privileges of Dr. Schueller based on these five out of six items. Is there any discussion? All in favor, raise your hand. (Birriel, Walsh, Gresham, and Burt voting unanimous)

Q None opposed. Okay, the next item we need to do is make a recommendation to the Board will we terminate him from staff or make a motion to place him back on staff. We'll hear a motion.

DR. BURT: I don't understand what that means. We've already revoked his privileges. What else do we need to do?

Q Well, it's been recommended that on the basis of these two items that we make a determination on these two items that we've already upheld that we either terminate him from staff or recommend that he be placed back on staff. We're to make a recommendation to the Board either to terminate him or to place him back on staff.

DR. BURT: We've already voted to uphold the revocation of privileges. It just seems redundant, but I'll do whatever.

DR. WALSH: I'll move we terminate him from the staff. Is that the right terminology?

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Q Yes.

DR. BIRRIEL: Based on?

* * *

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO. 92-1075

STEVEN C. SCHUELLER, M.D.

PLAINTIFF

VS.

CLAIR NORMAN, HERMAN HAMILTON, JR., WILLIAM S. ARNOLD, NED HASTINGS, and ROOSEVELT EARLY, TRUSTEES OF THE CROSSETT HEALTH FOUNDATION; ASHLEY MEMORIAL HOSPITAL; DR. TOMAS BIRRIEL; DR. F.N. BURT; DR. E.A. GRESHAM; DR. LUIS F. GARCIA; DR. C.E. RIPLEY; DR. J.D. RANKIN; DR. D.L. TOON: DR. BENJAMIN J. WALSH; JOHN DOE #1; AND JOHN DOE #2

DEFENDANTS

DEPOSITION OF

TOMAS BIRRIEL, M.D.

* * * * * *

Appendix G

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Crossett, Arkansas
January 4, 1994

* * *

[15] attract other specialists. Besides that my wife's practice, and this I'm quoting by myself, I don't know what she would say, she was practicing here and was doing fine but it doesn't seem like there was much room for an extra dentist, if you will in town, so it hasn't done as well as we'd like to so we're looking somewhere.

Q Where are you going?

A Right now I don't have a contract.

Q Do you have an agreement with a recruiting firm?

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A Not with one recruiting firm. I've talked to several recruiting firms.

Q You mentioned that one of the procedures you perform is endoscopy at A.M.H.?

A Yes.

Q Is it your practice to use intravenous _____ sedation in endoscopy?

A My practice?

Q Yes.

A I usually don't give _____. I work with an anesthetist who uses _____, yes.

Q Is it your practice to have an anesthetist to monitor the patient during the procedure and then to send the patient to the recovery room after the procedure?

A If he's available, yes, I prefer that.

Q Have you been criticized for that practice?

[16] A Have I been? Yes.

Q Was that by Dr. Schueller?

A Yes.

Q By anybody else?

A No. I don't think so.

Q Is there any disadvantage that you perceive in doing the procedure in the way you do it?

A Any disadvantage? I don't understand the question.

Q Is there any economic disadvantage to the patient?

A He would have, I suspect, the extra charge for the use of the anesthetist. As far as the charge for IV sedation or whatever I guess one could charge the same by the physician.

Q Are you aware that Dr. Schueller wrote the Correspondent Society of Surgeons and asked for their opinion on whether or not it was necessary to perform the endoscopy procedure in the manner that you describe with the anesthetist and the use of the recovery room?

A Yes.

Q Were you aware of the result of that inquiry to the Correspondent Society of Surgeons?

A As far as the letter that was sent back?

Q Yes.

A Yes. I remember reading those letters.

Appendix G

Q Do you remember there were general surgeons who criticized the use of the anesthetist in the recovery room as unnecessarily

* * *

[26] A Operating room tables. I guess they bought a used refurbished one to replace the old one that was put in a different room.

Q Was that before or after Dr. Schueller left?

A I don't know. You can probably get that from the hospital.

Q What else?

A They improved the ventilation in the operating room.

Q What procedures are you able to do in surgery at A.M.H. that you weren't able to do when you first came here because of improvements to the hospital?

A The laproscopic equipment to do colonoscopy. I know they one more edoscopy so in case one of them broke or whatever that we could replace it. Laproscopic tubal ligations. Assorted stapling instruments that are used in surgery.

Q I'm asking now what procedures you do now that you couldn't do before '89 before improvements were made to the facilities at A.M.H. I'm asking more what kinds of operations.

A The laproscopic procedures, colonoscopy.

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Q What percentage of your surgical practice in the last year has consisted of endoscopic procedures?

A I'm going to have to — I don't know for sure. I'd say maybe 30% but that's just an estimate.

Q How many other kind of scope procedures make for instance

* * *

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
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NO. 92-1075

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DEFENDANTS

DEPOSITION OF

TOMAS BIRRIEL, M.D.

* * * * * *

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* * *

[6] Q They paid your moving expense?

A No.

Q What was the salary guarantee, how much?

A I don't know if I can give your that information because I don't remember if I'm free to give it based on the contract. I don't remember.

Q Fotunately we have the lawyer for the hospital here.

MR. MILLER: Chip, I have not seen the contract. We've taken the position obviously that at least the physicians I represent that their financial information is confidential. The contract that he has that he has apparently entered into for the first year I've not even seen the contract, but I can try to obtain a copy. If it looks like something that would not be — if he would not be breaking some type of contractual agreement with the hospital then I don't have any problems providing that specific salary guarantee to you.

MR. WELCH: I just want a copy of the contract.

MR. MILLER: I think you've already asked for them and I think we've provided the appropriate objections.

MR. WELCH: (Continuing)

Q How many surgical cases since 1989 do you do per year at Ashley Memorial on average?

A I probably can give you an average per month. As far as total maybe myself, probably I think we've been increasing within the amount and I think within the last year we've done somewhere around forty-five or fifty or so.

Q In a month?

A Yes.

Q How many have you done since you've been here?

A I have no idea. Initially we started just like when you start a practice you start small and increase as time goes by.

Q For instance would it be your testimony that fifty surgical cases this month is indicative of how many cases you've done monthly in 1993?

A Probably forty-five or fifty something like that.

Q So you've done forty-five or fifty surgical cases per month in 1993?

Appendix G

A If you want an average. I haven't counted them but I suspect it's about that.

Q So it would be your testimony then that you've done whatever that is, 480 surgical cases or more in 1993?

A Probably.

Q Make it easy on yourself. Is that in the ballpark would you say?

A Yeah. I think it is.

Q What about in '92?

A I have no idea.

Q Do you think it would be less than 480?

A Either a percentage less or about the same.

Q What percentage of the cases that you're did in 1993 would

* * *

Appendix G

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

NO.: 92-1075

DR. STEVEN C. SCHUELLER, M.D.

PLAINTIFF

vs.

CLAIR NORMAN, ET AL.

DEFENDANTS

AFFIDAVIT OF STEVEN C. SCHUELLER, M.D.

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

I, STEVEN C. SCHUELLER, M.D., being over the age of eighteen years, hereby make my Affidavit as follows:

1. I am a Board Certified member of the American College of Surgeons.

2. I was recruited and induced to move to Crossett, Arkansas from Iowa in 1983 for the purpose of establishing a medical and general surgical practice in Crossett, Arkansas. Mr. Ned Hastings was Chairman of the Board at the time of my recruitment.

3. After moving to Crossett in 1983, I also acted as the

physician "on-call" or subject to call, at the Ashley Memorial Hospital ("AMH") emergency room until 1991 when my credentials at AMH were revoked.

4. During the time period in which I was being solicited to move my practice from Iowa to Crossett, I was assured by the AMH administration and the defendant doctors (exclusive of Dr. Birriel) that a sufficient patient base existed in the geographic area surrounding Crossett to support a general surgical practice at AMH and that the defendant doctors, exclusive of Dr. Birriel, would support my efforts to establish a general surgical practice in Crossett, Arkansas at AMH with patient referrals. AMH and I entered into a written agreement under the terms of which AMH agreed to provide a minimum financial guarantee for a specified period of time and an extension of credit in support of my efforts to establish a general surgical practice at AMH in Crossett, Arkansas.

5. My decision to move to Crossett, Arkansas was also based on assurances from AMH administration relating to the extent to which the operating room at AMH would be adequately and properly equipped and staffed.

6. In 1983, after moving to Crossett, I performed 203 surgical cases at AMH, and 247 surgical cases at AMH in 1984.

7. In 1983, sixty-two percent (62%) of my surgical cases were in the form of referrals from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

8. In 1984, sixty-five percent (65%) of my surgical cases were in the form of referrals from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

Appendix G

9. Throughout 1985, my relationship with AMH deteriorated over staffing the operating room and operating room equipment to be provided by AMH.

10. In 1985, I performed 210 surgical cases at AMH. Of the 210, 132 were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt, representing approximately sixty-three percent (63%) of my total surgical cases in 1985.

11. In 1986, I performed 181 surgical cases. Of this total, only eighty-six (86) were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

12. Surgical referrals from the above stated doctors declined thirty-five percent (35%) from 1985 to 1986.

13. In 1987, I performed 107 surgical cases. Of his total, only fifty (50) were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

14. Surgical referrals from these defendant doctors declined approximately sixty-two percent (62%) from 1985 to 1987.

15. In 1988, I performed sixty-one (61) surgical cases at AMH. Of this total, only twenty-six (26) were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

16. Surgical referrals from these defendant doctors declined approximately eighty percent (80%) from 1985 to 1988.

17. In 1989, I perfomed thirty-eight (38) surgical cases at

AMH. Of this total, eleven (11) were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

18. Surgical referrals from these defendant doctors declined approximately ninety-two percent (92%) from 1985 to 1989.

19. In 1990, I performed forty (40) surgical cases at AMH. Of this total, only seven (7) were surgical referrals received from Drs. Gresham, Garcia, Walsh, Rankin, Ripley, Toon and Burt.

20. Surgical referrals received from these defendant doctors declined by approximately ninety-five percent (95%) from 1985 to 1990.

21. Hospitals located in Monroe, Louisiana; Bastrop, Louisiana; El Dorado, Arkansas; Little Rock, Arkansas; and Pine Bluff, Arkansas are not located more than twenty-five (25) miles away from Crossett, Arkansas.

22. Relations between AMH and me continued to deteriorate throughout the period between 1986 and 1991.

23. On April 1, 1986, I attended a joint conference/medical staff meeting, during which Mr. Herman Hamilton, Chairman of the Board, suggested that physicians on staff at AMH consider transferring patients when it was medically possible, so that AMH might decrease its losses on those patients with no insurance. It is my understanding that such a practice was characterized as "dumping" and unlawful.

24. AMH and I continued to disagree about the level of staffing and equipping the AMH operating room from 1986

through 1991. In July 1986, I requested additional personnel for the operating room; however AMH reduced the operating room staff.

25. In July 1986, I granted a local radio station in Crossett, Arkansas an interview, during which I was asked about cited the deficiencies in the staffing and equipping of the operating room at AMH.

26. On August 6, 1991, Dr. Garcia and I were involved in an altercation at AMH.

* * *

32. I was forced to increase my reliance upon the general practice of medicine as a source of income due to the decline in my surgical referrals between 1985 and 1991.

33. My medical practice, both general and surgical has been destroyed by my revocation of clinical privileges at AMH in 1991. In January 1992, my record was unblemished in the National Practitioner Data Bank. AMH thereafter transmitted at least three (3) different reports of its actions in this single revocation to the National Practitioner Data Bank, in May 1992, June 1992 and September 1992, thereby associating me with incompetent physicians and physicians with drug and alcohol related problems. (See Exhibits 18 and 19).

34. I continued to believe that the trend of decreasing patient referrals from Drs. Toon, Garcia, Gresham, Burt, Rankin and Ripley was reversible until April 1989. In April, 1989, I received correspondence from Dr. Birriel indicating his allegiance with the AMH administration against me which led me to alter my opinion.

Appendix G

35. Dr. Birriel, following his arrival in Crossett, performed the gastric procedure of endoscopy, employing intravenous Versed as a sedative, by administering that drug, and performing that procedure in the AMH operation room, assisted by the nurse anesthetist, and other nurses; and thereafter, moving the patient to the AMH recovery room. I questioned that practice from the standpoints of proper surgical procedure and whether economically justifiable.

36. In May, 1990, I solicited an opinion from the Correspondence Society of Surgeons, a national peer review advisory service for general surgeons, regarding whether it was medically necessary or economically justifiable when employing intravenous Versed during an endoscopy procedure to administer that drug in an operating room setting in the presence of an anesthetist and with the assistance of nurses.

37. In response, I received from a panel of Board Certified surgeons and gastroenterologists was that performing the endoscopy procedure in this manner was "An unnecessary waste of the hospital's resources," unless warranted by medical conditions (See Exhibit 14 for a copy of the response I received from that organization).

FURTHER, AFFIANT SAYETH NOT.

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS,
EL DORADO DIVISION

No. 92-1075

DR. STEVEN C. SCHUELLER, M.D.,

Plaintiff,

-vs-

CLAIR NORMAN, et al.,

Defendants.

THE DEPOSITION OF ALVIN W. SMITH, JR., produced, sworn and examined on the part of the Defendants, pursuant to Agreement of Counsel, on Wednesday, the 1st day of September, 1993, at KCI Airport, American Airlines Ambassador Club, in the City of Kansas City, in the County of Jackson, State of Missouri, before me,

JUDITH L. LEITZ, CSR, RPR
of

JOHN M. BOWEN & ASSOCIATES
Shorthand Reporters

A Notary Public in the County of Jackson, State of Missouri, in a certain cause now pending in the United States District Court for the Western District of Arkansas, El Dorado Division, wherein DR. STEVEN C. SCHUELLER, M.D., is Plaintiff and CLAIR NORMAN, et al., are Defendants.

Appendix G

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BY: MR. CHARLES L. SCHLUMBERGER

* * *

[6] Q. Was it at the first of the year, middle of the year, end of the year?

A. About August, I believe. Wait a minute, excuse me, I think it was '88. I believe it was '88. August of '88.

Q. And what position did you — were you employed with at Ashley Memorial Hospital?

A. I was the certified registered nurse anesthetist.

Q. And how long were you with Ashley Memorial Hospital?

A. Eight years.

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Q. Did you work exclusively with Ashley Memorial during that eight-year term?

A. No, I moonlighted once in a while at Wilmot, Monticello once or twice.

Q. Did you work in any clinics in the Crossett area, Hamburg?

A. No.

Q. And since 1988, I take it, you've been retired and have no other type of employment?

A. Right.

Q. Mr. Smith, if you would just briefly give me your educational background.

A. High school, nursing, anesthesia.

* * *

[19] A. I wasn't there when that occured.

Q. Mr. Smith, with respect to the conversation that you talked to Dr. Schueller about, explain to me, and I'm talking about the conversation with Mr. Reynolds, what was the substance of that conversation?

A. We were discussing — we were in the locker room just talking and Dr. Schueller said that the hospital, apparently, was giving him a bad time or going to remove him from the staff because of the money that he owed them. I was — since

Dr. Schueller did the surgery and if they removed him from the staff, it was kind of letting me fly in the wind. So — and I'm not sure how long afterwards, but I went to Mr. Reynolds and asked him if what was — what was happening with Dr. Schueller, and the case load had been going down and down, and Mr. Reynolds said, "Don't worry about Dr. Schueller, the plan is to let him die on the vine and bring in Dr. Posey," which made —

Q. Go ahead.

A. Which kind of shook me up a little bit.

And I contacted the DeQueen Hospital in Stutgart to see if they were in — looking

* * *

[22] A. Well, it would mean that surgery would be cut down, because those doctors didn't operate all that often; and without surgery, they have no need for me.

Q. Is it fair to say, Mr. Smith, that Dr. Schueller was your primary source of income?

A. Yes, sir.

Q. Do you recall what Mr. Reynolds indicated he meant by "let him die on the vine"?

A. He didn't — that was the statement.

Q. Did he elaborate to any extent on that phrase?

A. No, he didn't. Approximately, I don't know, sometime later, I can't even remember who asked me, would I go to Bill Arnold's and repeat the statement that Mr. Reynolds had made. Mr. Arnold, I think, was the attorney for the hospital.

Q. And who asked you to talk with Mr. Arnold?

A. I'm not sure. I don't really — I don't really remember. I'm not even sure it wasn't after Mr. Reynolds had left.

Q. Do you recall whether you did, in fact, go talk with Mr. Arnold?

A. Yes, I did.

Q. And tell me about that conversation.

* * *

[38] A. I have.

MR. MILLER: Pass the witness at this time.

EXAMINATION

BY MR. SCHLUMBERGER:

Q. Mr. Smith, my name is Charlie Schlumberger.

A. I'm not laughing at you, I'm laughing with you.

MR. WELCH: He's not laughing, for the record.

Q. (BY MR. SCHLUMBERGER) I've had to deal with it now for 40 years.

I am the attorney for certain specific Defendants who are doctors in this case. They are Dr. Gresham, Dr. Garcia, Dr. Ripley, Dr. Toon, and Dr. Walsh. Okay?

A. Okay.

Q. Frankly, I believe Mr. Miller has probably asked most of my questions, and I'll try not to be too repetitive.

A. All right.

Q. First of all, concerning the conversation that you had with Mr. Reynolds, I don't specifically recall whether you testified, but do you know when that occurred?

A. I had — I can't really put a date — date and [39] time to it; but, it was at the time that Dr. Schueller was having problems and the hospital was threatening to kick him off the staff, which I would say '85 sometime.

Q. Now, you say —

A. Mr. Reynolds, it was during his tenure, when he was there.

Q. You say when he was having problem with the hospital and the hospital was threatening to kick him off the staff?

A. Right, remove — to take his staff privileges from him.

Q. That sounds to me like a slightly different statement.

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When did you become aware that the hospital was threatening to take his privileges away?

A. When Dr. Schueller told me the the hospital was threatening to take his privileges away from him, because of the money that he still owed the hospital.

Q. So, it was your understanding, based on what Dr. Schueller told you, that the hospital was threatening to take his privileges away?

A. Yes.

[40] Q. And then, after that, that was in the locker room, right?

A. Yes, that was in the locker room.

Q. And then, you had your conversation with Mr. Reynolds?

A. Yes.

Q. Would you please tell me one more time what Dr. Reynolds — or excuse me — what Mr. Reynolds said to you?

A. Said, "Don't worry about Dr. Schueller, the" — excuse me, when I got — I've got to put this in the whole perspective.

I asked him what was happening with Dr. Schueller and his staff privileges. He said, "Don't worry about Dr. Schueller, the plan it to leave him die on the vine and bring Dr. Posey."

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Q. And you were — you were very specific and deliberate when you said that. Those were his exact words?

A. Almost right — I can picture in my mind exactly where he was at and what he was doing when he said it.

Q. I understood you to say that he said, "The plan is to let him die on the vine"?

* * *